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THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

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High Court, Allahabad ... G. T. SPANKIE, *Lincoln's Inn.*

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ALLAHABAD:

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JUDGES OF THE HIGH COURT.

CHIEF JUSTICE:

HON'BLE SIR ROBERT STUART, *Kt.*, *Q.C.*

PUISNE JUDGES:

HON'BLE DOUGLAS STRAIGHT.
" R. C. OLDFIELD.
" M. BRODHURST.
" W. TYRRELL.
" SYED MAHMOOD (*Offg.*)

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THE

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APPELLATE CIVIL

1881
June 6.

Before Mr. Justice Tyrrell and Mr. Justice Duthoit.

PIRTHI SINGH (DEFENDANT) *v.* LOBHAN SINGH (PLAINTIFF).*

Suit on behalf of minor—Permission to sue.

The uncle of a minor instituted a suit on his behalf without obtaining the formal permission of the Court in which such suit was instituted to sue on his behalf. The uncle's right to sue was denied by the defendant; and the first of the issues framed was whether he had such right. The Court decided that he had such right *Held*, in second appeal, that, although permission to sue or defend a suit on behalf of a minor should be formally granted, to be of effect, such decision might fairly be accepted as in this case a sufficient and effective permission to the uncle to sue, and he was competent to maintain such suit. *Mrinamoyi Dabia* v. *Jogodishwri Dabia* (1) referred to.

MAHARAJI, the mother and certificated guardian of Manbhawan Singh, a minor, borrowed certain moneys on his behalf from Pirthi Singh, one of the defendants in this suit, and gave Pirthi Singh a bond for the payment of such moneys, in which she mortgaged the minor's landed property. Pirthi Singh sued Maharaji, as Manbhawan Singh's guardian, to recover such moneys, and obtained a decree against her in that character, in execution of which such property was advertised for sale. On the 18th January, 1880, Lobhan Singh, the uncle of the minor and the plaintiff in this suit, applied to the District Court for permission to bring a suit "to protect the minor's property from sale," on the ground that it had been alienated without the Court's permission and without legal necessity.

* Second Appeal, No. 1338 of 1880, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 3rd September, 1880, affirming a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 22nd June, 1880.

(1) I. L. R. 5 Calc. 450.

1881

PIRTHI SINGH v. LOBHAN SINGH.

Such application was made apparently with reference to the provisions of s. 19 of Act XL of 1858. The Court made an order on the same day granting Lobhan Singh permission to sue. Lobhan Singh accordingly brought the present suit, as the uncle of Manbhawan Singh, minor, against Pirthi Singh, Maharaji, and the purchaser of the property, which had in the meantime been sold in execution of Pirthi Singh's decree, to set aside such sale. The defendant Pirthi Singh set up as a defence to the suit, *inter alia*, that the frame of the suit was bad, it having been brought by the plaintiff in his own name. The Court of first instance framed as one of the issues for trial the issue: "Has the plaintiff a right to bring this suit?" Upon this issue the Court held, having regard to the District Court's order of the 19th January, 1880, that the plaintiff had a right to sue; and deciding the case on the merits in favour of the plaintiff gave him a decree. On appeal the same defendant again contended that the plaintiff was not competent to sue in his own name. The lower appellate Court observed as regards this contention as follows: "It is urged that, under s. 440 of Act X of 1877, the suit should have been instituted in the minor's name by an adult person, who shall be called the next friend, whereas it has been instituted by Lobhan Singh as uncle of Manbhawan Singh; the Court cannot admit the objection; the whole plaint shows that Lobhan Singh was suing for the minor; he had obtained permission to sue, and even if it would have been more regular to have entered Manbhawan Singh, minor, as plaintiff, and Lobhan Singh as the next friend of the minor, still the irregularity is not a vital one, and in no way affects the merits of the suit" On second appeal to the High Court the defendant Pirthi Singh again contended that the plaintiff was not competent to sue in his own name.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Ratan Chand*, for the respondent

The judgment of the Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

DUTHOIT, J.—Although not formally stated in the preamble of the plaint, or in the naming of the suit, there is no doubt that the suit was practically instituted by Manbhawan Singh, a minor,

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PIRTHI SINGH v. LOBHAN SINGH.

through a next friend, his uncle Lobhan Singh. It has been found by both the Courts below, and it seems to be certain, that on the merits the plaintiff was entitled to a decree. But in the lower appellate Court, and here in second appeal, it has been pleaded that Lobhan Singh, not having been formally admitted as the minor's next friend, had no *locus standi* in Court, and that the suit, as wrongly instituted, should have been dismissed. The facts as regards Lobhan Singh's position in the suit are as follows: On the 19th January, 1880, Lobhan Singh applied to the Judge of Farukhabad for permission to sue in the terms of s. 19 of Act XL of 1858 for cancelment of an auction sale adverse to the interests of his nephew, the minor. The permission solicited was granted by the Judge on the same date; armed with it, Lobhan Singh sued in the Munsif's Court; his right to sue was denied by the defence, and the first of the issues framed by the Munsif was whether he had this right. The Munsif found that he had, with reference to the order of the Judge. There can be no doubt that the Judge's order of the 19th January was erroneous. S. 19 of Act XL of 1858 has reference to an altogether different set of facts to those which the applicant's petition disclosed, and its provisions, therefore, are in this case inoperative. It is also true [*Mrinamoyi Dabia* v. *Jogodishuri Dabia* (1)] that permission to sue or defend a suit on behalf of a minor, to be of effect, must be formally granted. But we think that the finding of the Munsif in the plaintiff's favour under the first of the issues set out by him may fairly be accepted as in this case a sufficient and effective permission. The appeal is dismissed with costs.

Appeal dismissed.

1881
June 7

Before Mr. Justice Straight and Mr. Justice Tyrrell.

LACHMAN SINGH AND ANOTHER (PLAINTIFFS) *v.* KESRI AND OTHERS (DEFENDANTS) *

Unregistered Bond for the payment of money hypothecating immoveable property —Admissibility in evidence of the bond in support of a claim for money—Mortgage—Act III of 1877 *(Registration Act), ss.* 17, 49—*Act XV of* 1877 *(Limitation Act), sch* II, *No* 66—*Single Bond*

On the 3rd February, 1871, the defendants, having borrowed Rs. 1,000 from the plaintiffs, executed in favour of the latter an instrument in which they mort-

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* Second Appeal, No. 1314 of 1880, from a decree of J. H Prinsep, Esq., Judge of Cawnpore dated the 11th September, 1880, reversing a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 15th July, 1879

(1) I. L. R 5 Calc. 450.

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gaged, by way of conditional sale, certain immovable property as security for the loan, and in which it was provided that they should pay certain interest on such sum annually and should pay such sum on the expiration of five years from the date of such instrument, and in the event of failure in these respects that the plaintiffs might apply for foreclosure. On the 18th January, 1879, the plaintiffs sued the defendants for the balance of such sum and interest, waiving their claim on such property, and suing for such balance as a simple debt, as such instrument was not registered. *Held*, following *Sheo Dial* v. *Prag Dat Misr* (1), that, inasmuch as such instrument involved a personal obligation on the defendants distinct and severable from the obligation in respect of such property, such instrument, notwithstanding it was not registered, was admissible as evidence in support of the claim to enforce the money-obligation; and it was also admissible in proof of the fact that the debt was not exigible from the defendants until on and after the expiration of five years from the date of the loan. *Held* also that the limitation period in No. 66, sch. ii of Act XV of 1877, was not applicable, as the claim of the plaintiffs was not based on a single bond, that is to say a bill or written engagement for the payment of money, without a penalty.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

TYRRELL, J.—The plaintiffs claimed Rs. 826-5-0, balance of principal, and Rs. 988-15-0, interest, borrowed on the 3rd February, 1871, by the ancestors of the defendants, who on that date executed a deed of mortgage or conditional sale-deed of their property in land in certain villages as security for the loan of Rs. 1,000. The material contents of the instrument are the following: "That the obligors are the exclusive proprietors in a zamindari share in mauzas Mahbubnagar and Thoman; that they now mortgage their said zamindari share to the obligees in consideration of Rs. 1,000 for the term of five years from the date of this deed, covenanting to pay the mortgage-money with interest at the rate of Re. 1-2-0 per centum per mensem, and thus redeem the mortgaged property; that such interest must be paid punctually year by year; on any failure to pay the yearly interest in each year, or on failure of payment of the principal amount in one sum on the expiry of the

(1) I. L. R., 3 All., 229.

period of five years, in *either case* the mortgagee shall be at liberty to sue for absolute proprietary right, and then the mortgage-money and interest due thereon will be deemed to be the sale-consideration, and the mortgage-deed to be a deed of absolute sale." The mortgagors retained possession of the property under the express terms of the deed, but the deed for some undeclared reason was never registered. The plaintiffs, therefore, waive their claim on the property purporting to be hypothecated, and sue for the balance still due as a simple debt. The plaintiffs alleged payments by the defendants of Rs. 782-0-0 on the 15th May, 1873, and 3rd May, 1874. The defendants pleaded *inter alia* that they had paid the debt in full, having made their last payment on the 17th May, 1873.

Looking to all the terms of the bond, it appears that it contains a personal covenant by the obligor for the payment of a debt as well as clauses hypothecating his immovable property of more than Rs. 100 in value as security for such payment. It is true that these terms are not very artistically or unambiguously expressed. It was also covenanted and agreed that on failure by the mortgagor, who retained possession of the mortgaged property, to pay the yearly interest in any year for a period of five years, or on his failure to repay in one lump sum the principal mortgage-debt on the expiry of the term of five years, the mortgagor had the option to sue forthwith for proprietary possession of the property. In the event of his doing so the mortgage-consideration was to be treated as the sale-price of the property, the mortgage-deed becoming a deed of absolute sale. Thus the obligors made two distinct covenants; (*a*) that they would pay each year's interest punctually in each year, and the principal debt promptly on the expiry of five years from the date of execution of the deed; and (*b*) in the event of failure in these respects, the mortgagor might treat the transaction as one of conditional sale, and take proceedings of foreclosure on the property. It would appear that from an early stage in the mortgage period the parties lost sight of this remedy; for we have credits of payments of sums largely exceeding a year's interest, or even the accumulated interest of two consecutive years, allowed by the plaintiffs to the defendants' account in the third year of the mortgage period. Thus the deed of February 1871 is shown to involve a personal obligation of the obligors distinct and severable

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from the obligation in respect of the property, and the bond is, therefore, notwithstanding its disabilities in regard to the registration law, admissible as evidence in support of a claim to enforce the money-obligation. It would also in our judgment be admissible in proof of the fact that the debt was not exigible from the defendants until on and after the expiry of five years from the date of the loan. In holding thus we follow the Full Bench ruling of this Court in *Sheo Dial* v. *Prag Dat Misr* (1).

It remains to consider whether the plaintiff's claim or any portion of it is within the limitation provided for the recovery of a simple money debt. This suit was instituted on the 18th January, 1879. It is obvious that three years from the date of the loan have long ago expired. Neither is the plaintiff helped by the provisions of art. 66 of the Limitation Act—"On a single bond where a day is specified for payment"—that day being here the 3rd February, 1876: for the plaintiff's claim is not based on a *single* bond, that is to say a bill, or written engagement for the payment of money, without a penalty. But it is contended that s. 20 of the Limitation Act saves the plaintiff's suit, part-payment of principal and interest having been made by the defendant before the expiration of the prescribed period for recovering the debt. But there is no proof of such payments in this case, nor even an allegation that in respect of part-payments of principal the fact of the payment appears in the handwriting of the person making such payment. The last payments according to the plaintiff's own case were made in May, 1874. The appeal fails, and is dismissed with costs. The objection on behalf of the respondents is not allowed

Appeal dismissed.

1881
June 10.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

LACHMAN PRASAD (PLAINTIFF) *v.* CHAMMI LAL AND OTHERS (DEFENDANTS) *

Suit for money had and received for the plaintiff's use—Suit of the nature cognizable in Small Cause Court.

C, a mortgagee, the mortgage having been foreclosed, sued *D*, the mortgagor, for possession of the mortgaged property and obtained a decree for possession

* Second Appeal, No. 75 of 1881, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 20th November, 1880, reversing a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 7th May, 1879.

(1) I. L. R., 3 All., 229.

thereof. He subsequently agreed with *D* to surrender the mortgaged property to him, if he deposited the mortgage-money in Court by a specified day. *D* borrowed the money for this purpose by means of a conditional sale of the property to *L*, and deposited it in Court. The deposit was made after the specified day and consequently *C* took possession of the property. The money deposited by *D* remained in deposit, and while there *C* caused it to be attached in execution of a money-decree he held against *D*, and it was paid to him. *L* thereupon sued *C* in the Munsif's Court to recover such money, which amounted to Rs. 350 *Held* that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes.

THE mortgagees of certain immovable property, the mortgage having been foreclosed, sued the mortgagor, Daya Ram, for possession of the mortgaged property, and obtained a decree for possession thereof. They subsequently entered into an agreement with Daya Ram to surrender the property to him, if he deposited the mortgage-money in Court by a specified day. Daya Ram borrowed the money for this purpose by means of a conditional sale of the property to the plaintiff in the present suit, Lachman Prasad, and deposited it in the Court which had made the decree against him. The deposit was made after the day specified, and the mortgagees in consequence took possession of the property. The money deposited by Daya Ram remained in deposit, and while there the mortgagees caused it to be attached in execution of a money-decree which they held against Daya Ram, and it was paid to them. Lachman Prasad thereupon brought the present suit against the mortgagees to recover such money, which amounted to Rs. 350 odd, instituting the suit in the Munsif's Court. The defendants set up as a defence to the suit that it was not cognizable in the Munsif's Court, but in the Court of Small Causes having local jurisdiction. The Munsif held that the suit was cognizable by him and not cognizable in a Court of Small Causes. On appeal by the defendants the lower appellate Court took a different view of the nature of the suit, and returned the plaint in order that it might be presented to the Small Cause Court. The plaintiff appealed to the High Court, contending that the suit was cognizable in the Munsif's Court.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Pandit *Nand Lal*, for the respondents.

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LACHMAN PRASAD v. CHAMMI LAL.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—Looking at the form of the plaint in this case, we think the suit must be regarded as one for money had and received by the defendants for the use of the plaintiff. In other words, the plaintiff's claim is for money which has come into the hands of the defendants under such circumstances that they must be taken to hold it to the use of the plaintiff, and to be under an implied contract to pay it to him. On these grounds, and not those mentioned by the Subordinate Judge, we think that the suit was cognizable by a Court of Small Causes, and therefore no second appeal lies to this Court. The appeal is dismissed with costs.

Appeal dismissed.

1881 June 21.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

KHARAG SINGH (DEFENDANT) v. BHOLA NATH AND OTHERS (PLAINTIFFS).*

Bond—Interest—Penalty—Equitable relief.

By a registered bond for Rs. 4,500, dated the 4th October, 1875, in which immovable property was hypothecated as collateral security, it was provided that the obligor should pay interest at the rate of Re. 1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest that he should pay interest at the rate of Rs. 2 per cent. per mensem from the date of the bond. The bond also contained a stipulation against alienation and declared that the principal sum was payable on demand. The obligees sued the obligor upon the bond, claiming to recover the principal sum, and interest from the date of the bond for three years eleven months and twenty days, less different sums amounting to Rs. 1,600 paid from time to time on account, at the defaulting rate of Rs. 2 per cent *Held* that, having regard to the fact that the security of property was given for the loan, and the obligor contracted not to alienate the property, that the defaulting rate of interest provided by the bond was of a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself, and should not be awarded, but that reasonable compensation only should be awarded for the obligor's breach of contract in respect of interest. Accordingly the Court made a decree giving the obligees interest on the principal sum, from the date of the bond to the date of the decree, at Re. 1-4-0 per cent. per mensem, and compound interest, from the date of default in the payment of interest to the date of the decree, at the rate of four annas per cent. per mensem, by way of damages for such default.

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* First Appeal, No. 76 of 1880, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 15th January, 1880.

Bansidhar v. *Bu Ali Khan* (1) followed : *Mackintosh* v. *Wingrove* (2) dissented from.

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KHARAG SINGH v. BHOLA NATH.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondents.

The High Court (STUART, C. J., and STRAIGHT, J.,) delivered the following judgments :—

STRAIGHT, J.—On the 4th October, 1875, Kharag Singh, defendant-appellant, borrowed from Har Gopal and Dhanraj, bankers of the town of Khurja, now deceased, and represented in this suit by their sons, the plaintiffs-respondents, the sum of Rs 4,500, hypothecating his share in a certain zamindari as security for the advance. By the bond, which was duly registered, the obligor agreed to pay interest at the rate of Re. 1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest, it was provided "then, on account of breach of contract, he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond." The instrument also contained a stipulation against alienation, and declared the principal sum to be payable on demand. The plaintiffs-respondents now sue the defendant-appellant to recover the Rs. 4,500 loan, and interest from 4th October, 1875, for three years eleven months and twenty days, less different sums, amounting to Rs. 1,600, paid from time to time on account, at the defaulting rate of Rs. 2 per cent., and the lower Court has decreed the claim in its entirety. The defendant appeals to this Court, and the only contention urged at the hearing on his behalf was, that the provision of the bond as to an increased rate of interest upon default in payment of the ordinary interest is in the nature of a penalty, and should not be enforced. In a Full Bench decision of this Court upon a reference from the Judge of Aligarh—*Bansidhar* v. *Bu Ali Khan* (1)—to which I was a party, and which has been followed by Pearson, J. and myself in Second Appeal No. 771 of 1880 (3), the question of penalty was discussed; and it

(1) I. L. R., 2 All. 260. (2) I. L. R., 4 Calc. 137.
(3) Unreported.

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does not appear to me that any useful purpose can be served by recapitulating at length the opinions therein expressed to which I still adhere. As far as I can ascertain, it has been the uniform practice of this Court, as in numerous instances in the Calcutta and Bombay Courts, to give relief against exorbitant interest as being in the nature of a penalty, and the propriety and necessity for doing so seem to me imperative. The Subordinate Judge refers to a judgment of Garth, C. J., concurred in by Markby, J,—*Mackintosh* v. *Wingrove* (1)—as the authority upon which his decision has proceeded. With the greatest respect for those two learned Judges, they seem to me to lay down a principle that, if arbitrarily acted upon, would absolutely put it out of the power of the Courts of this country to grant relief to a multitude of foolish and improvident persons, of whose impecuniosity greedy and unscrupulous money-lenders are always ready to take advantage, in extorting from them promises to pay the most inequitable and extravagant interest. It seems to me that in this appeal we should regard the defendant-appellant as a person who, having broken his contract with the plaintiffs-respondents, is bound to make reasonable compensation to them in respect to such breach. And the question then arises whether the amount provided by the bond is or is not reasonable. In my opinion, having regard to the fact that the security of property was given for the loan, and the borrower contracted not to make any further alienation of it until the whole debt was discharged, the defaulting rate provided by the bond was of a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself. I would accordingly decree the appeal in so far as it relates to the amount of interest allowed by the Judge, and as to the principal sum, would give the plaintiffs-respondents interest from the 4th October, 1875, to the date of our decree at Re. 1-4-0 per cent. per mensem. Upon the amount of interest applicable to the period between the breach of contract and our decree, I would allow as damages for the failure to pay it four annas per cent. per mensem from the date of the actual default. Costs will be given in proportion to the amount decreed.

(1) I. L. R., 4 Calc. 137.

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STUART, C. J.—I have read the judgment of Straight, J., in this case, and concur in it and in his proposed order. I cannot too strongly express my dissent from the ruling of the Calcutta Court to which the Subordinate Judge refers, but I would further observe that in this particular case the plaint itself shows that in his own mind the plaintiff regarded the additional interest stipulated for as in itself strictly penal, by the allegation that "in case he (the defendant) should fail to pay six-monthly interest, then *on account of breach of contract* he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond." Language could not more plainly show that this provision of the contract was and is distinctly intended to be penal.

Decree modified.

Before Mr. Justice Straight and Mr. Justice Duthoit.

1881 *June* 22.

BIRBAL AND ANOTHER (DEFENDANTS) *v.* TIKA RAM (PLAINTIFF).*

Determination of title by Revenue Court—Res judicata—Jurisdiction of Civil Court —Act XVIII of 1873 (*North-Western Provinces Rent Act*), *ss.* 36—39.

The defendants, claiming to be occupancy-tenants of certain land, and alleging that the plaintiff was their sub-tenant, caused a notice of ejectment to be served on the plaintiff under ss. 36—38 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application contesting his liability to be ejected, alleging that he had a right of occupancy in such land jointly with the defendants, and was not their sub tenant. The Assistant Collector trying the case finally decided that the plaintiff was the sub-tenant of the defendants, and the plaintiff was ejected. The plaintiff then sued the defendants in the Civil Court for a declaration of his right as an occupancy-tenant to such land and possession of the same. *Held* that the decision of the Assistant Collector as to the respective rights of the parties could only be regarded as incidental and ancillary to the main point to be determined by him, *viz.*, whether, assuming the relation of landlord and tenant to exist between the parties, the plaintiff was liable to be ejected, and such decision was not a bar to a fresh determination of such rights in the Civil Court.

THE plaintiff in this suit claimed a declaration of his right as an occupancy-tenant to certain land and possession of such land. The suit was instituted in the Court of the Munsif of Etáwah. The defendants, claiming to be occupancy-tenants of such land, and alleging that the plaintiff was their sub-tenant, had caused a

* First Appeal, No. 31 of 1881, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 7th February, 1881.

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notice of ejectment to be served on the plaintiff under the provisions of s. 36 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application to the Revenue Court, contesting his liability to be ejected, alleging that he had a right of occupancy in the land jointly with the defendants, and was not their sub-tenant. The Revenue Court trying the case determined that the plaintiff was the sub-tenant of the defendants, and the plaintiff was accordingly ejected. The plaintiff thereupon instituted the present suit. The defendants set up as a defence to the suit that it was not cognizable in the Civil Courts. The Munsif held that the provisions of s. 95 of Act XVIII of 1873 debarred the Civil Courts from taking cognizance of the suit and dismissed it. On appeal by the plaintiff the lower appellate Court held that the Civil Courts were not debarred from taking cognizance of the suit by the provisions of that section, and remanded the case to the Munsif for re-trial.

The defendants appealed to the High Court, again contending that the suit was not cognizable in the Civil Courts.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgment:—

STRAIGHT, J., (DUTHOIT, J., concurring).—This is an appeal from an order of remand passed by the Subordinate Judge of Mainpuri on the 7th February last. The plaintiff-respondent brought a suit for a declaration of his hereditary cultivatory right in 18 bighas 9 biswas of mauza Mandari, pargana Auria, and for possession. The defendants-appellants pleaded that the suit was not cognizable by the Civil Court; that the plaintiff was dispossessed by an order properly passed by the Revenue Court; and that the 18 bighas 9 biswas in suit was their hereditary holding. The Munsif was of opinion that the plaintiff-respondent's claim was in the nature of that provided for by s. 10 of the Rent Act, and as such, being exclusively cognizable by the Revenue Court, could not be entertained by him. The Subordinate Judge in appeal adopted a contrary view, and reversing the decision of the Munsif, remanded the case for

trial on the merits. It is from this order that the defendants now appeal on the ground that the suit would not lie in the Civil Court; and that the question as to the rights of the parties having been determined by the Assistant Collector on the 14th June, 1880, in a proceeding under s. 39 of the Rent Act, is *res judicata*.

I am of opinion that this objection has no force, and that it cannot be sustained. It is true that the defendants-appellants obtained an order from the Revenue Court for the ejectment of the plaintiff-respondent from the 18 bighas 9 biswas, on the ground that he held the land as their shikmi, and that this proceeding was had under s. 95 of the Rent Act, and purported to be of a nature exclusively cognizable by the Revenue Court. The defendant-appellant had given a notice of ejectment to the plaintiff-respondent under s. 36, and he had made application to the Assistant Collector contesting his liability to be ejected under s. 39; and the Assistant Collector determined the question between the parties under this latter section. But it seems to me that his decision as to their respective titles can only be regarded as incidental and ancillary to the main point to be determined by him, namely, whether, assuming the plaintiff-respondent and the defendants-appellants to hold towards one another the relation of landlord and tenant, the former was liable to ejectment. The case of the plaintiff-respondent is that he has a joint hereditary cultivatory title with the defendants appellants, so that it cannot be said that any question of proprietary title to land between parties making conflicting claims thereto was raised which could give him an appeal to the Judge. Moreover, orders under s. 95 of the Rent Act, cl. (*d*), into which category applications under s. 36 fall, are excluded from appeal, the effect of which would be that the order of an Assistant Collector could, if no suit in the Civil Court were entertainable, finally dispose of a question of title. It appears to me that the words in s. 39, "the tenant may contest his liability to be ejected," assume the relation of landholder and tenant to exist. It certainly cannot be said that the present suit is in the nature of an application under s. 10 of the Rent Act by a tenant to have his class of tenure declared as against the landholder; on the contrary, it is a suit by one alleged joint cultivator against another to have his joint cul-

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BIKBAL v. TIKA RAM.

tivatory right declared and possession given him in that character and to that extent. Under these circumstances I cannot hold that the order of the Assistant Collector of the 14th June, 1880, excluded the plaintiff-respondent from asserting his right by a civil suit. I therefore think that the order of remand impugned by the appellants was a right and proper one, and that this appeal should be dismissed with costs.

Appeal dismissed.

1881 June 23.

Before Mr. Justice Straight and Mr. Justice Duthoit.

HAR SAHAI AND ANOTHER (DEFENDANTS) v. CHUNNI KUAR AND ANOTHER (PLAINTIFFS) *

Mortgage—Covenant to give the mortgagee possession—Suit for possession after expiration of term—Registration of mortgage deed in district in which the mortgaged property is not situate—Admissibility of document in evidence—Act III of 1877 (Registration Act), ss. 28, 49, 60.

An instrument of mortgage on land, which required to be registered, was presented for registration to a Registrar within whose district no portion of the land was situate, and was registered by such Registrar. In a suit to enforce such mortgage it was objected that such instrument, not having been properly registered, could not be received in evidence. *Held*, following the opinion of Broughton, J., in *Sheo Shunkur Sahoy* v. *Hurdey Narain Sahu* (1), that, when a document which purports to have been registered is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law. Moreover, that the mortgagor could not be allowed to take advantage of an objection which would not have been available but for his own wrongful act.

A mortgagor covenanted to give the mortgagee possession of the mortgaged property, but did not do so, and the mortgagee consequently sued him for possession, but not until the term of the mortgage had expired. The mortgagor set up as a defence to such suit that it was not maintainable after the expiration of the mortgage-term. This defence was rejected on the ground that the mortgagor had, by his breach of the mortgage-contract, put himself out of Court.

HAR SAHAI, one of the defendants in this suit, mortgaged certain immovable property situated in the Fatehpur district, in the North-Western Provinces, to one Girdhar Lal, whom the plaintiffs in this suit represented, for Rs. 900, promising to give the mortgagee possession of the mortgaged property. The mortgagor

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* Second Appeal, No 1264 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 31st July, 1880, affirming a decree of Pandit Kashi Narain, Munsif of Fatehpur, dated the 20th June, 1879.

(1) I. L. R. 6 Calc., at p. 29.

presented the instrument of mortgage for registration to the Registrar of the Bara Banki district, in Oudh. That officer, after such of the provisions of ss. 34, 35, 58 and 59, of the Registration Act as applied to the document had been complied with, endorsed thereon the certificate showing that it had been registered required by s. 60 of that Act. The mortgagor having refused to give the representatives of the mortgagee possession of the mortgaged property, the latter brought the present suit against the former for possession thereof, joining as a defendant the purchaser of a portion of the mortgaged property. At the time the suit was brought the term of the mortgage had expired. The defendants set up as a defence to the suit, *inter alia*, that the registration of the instrument of mortgage was invalid, as under s. 28 of the Registration Act it should have been registered in the office of the registering officer in whose district the mortgaged property was situated, and the instrument of mortgage was consequently not admissible as evidence of the mortgage; and that the suit was not maintainable because it was brought after the expiry of the term of mortgage. Both the lower Courts disallowed these contentions.

On second appeal to the High Court the defendants again contended, for the reasons stated above, that the instrument of mortgage was not admissible in evidence, and that the suit was not maintainable.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellants.

Mr. *Conlan*, for the respondents.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

DUTHOIT, J.—The facts of this case are well and fully stated in the judgment of the lower appellate Court. As regards the alleged defect in registration procedure, we are of the same opinion as Broughton, J., in *Sheo Shunkur Sahoy* v. *Hurdey Narain Sahu* (1). And apart from this, the appellant in the case before us is shown to have himself been the author of the alleged defect. He

(1) I. L. R., 6 Calc., at p. 29.

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cannot be permitted to take advantage of an objection which would not have been available but for his own wrongful act. We reject the plea that the plaintiffs' suit for possession of the mortgaged property will not lie because brought after expiry of the mortgage term, on the ground that, by failure on their own part to comply with the conditions of the bond, and to deliver possession of the property, the defendants-appellants are out of Court. The appeal is dismissed with costs.

Appeal dismissed.

1881 *June* 27.

Before Mr. Justice Straight and Mr. Justice Duthoit.

RAGHU NATH AND OTHERS (DEFENDANTS) *v.* THAKURI AND OTHERS (PLAINTIFFS).*

Hindu widow—Alienation—Reversioner—Declaratory decree.

Where a Hindu widow in possession as such of her deceased husband's property alienates it, only the person presumptively entitled to possess the property on her death may sue for a declaration of his right as against such alienation, unless such person has precluded himself from so suing by collusion and connivance, when the person entitled next to him may so sue.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case under s. 566 of Act X of 1877.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the appellants.

Munshi *Hannuman Prasad* and Pandit *Bishambhar Nath*, for the respondents.

The High Court (STRAIGHT, J., and DUTHOIT, J.,) made the following order of remand:

STRAIGHT, J.—This is a suit by Thakuri, Sheo Din, and Ram Prasad, alleging themselves to be reversioners of Nidhi Lal, deceased, after the death of his widow, Tulsha, to have their right declared against an alienation made by Tulsha in favour of her brother Raghu Nath, under a deed of gift of the 8th September, 1869. In the array

* Second Appeal, No. 92 of 1881, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 22nd November, 1880, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 11th September, 1879.

of defendants are included Tulsha, Raghu Nath, her brother, the donee, and her other two brothers, who with him are said to be in possession of the property; Mathuria Kuar, daughter of Janki, the brother of Nidhi Lal, deceased, and ten other persons. The defence set up by Tulsha and her brothers is that the plaintiffs have no reversionary rights; that Mathuria Kuar is the next reversioner; and that the property in suit was separately acquired by Nidhi Lal. Mathuria Kuar filed a written statement of defence, which, while asserting her right to the property on the death of Tulsha, stated that she did not now seek to have it declared, but would do so at the proper time. She did not, however, appear to the suit in Court, and it proceeded so far as she was concerned "*ex parte*." The other defendants offered no objection to the claim of the plaintiffs. The first Court decreed in favour of the plaintiffs in these terms: "I therefore give plaintiffs a decree declaring their right as reversioners to succeed to the estate of Tulsha, if they or any of them survive her, and that the gift made in defendant's favour, so far as their right to succeed to the estate after the Musammat is concerned, should be null and void." The Judge in appeal upheld this decision and dismissed the appeal with costs. Tulsha and her brothers appeal to this Court, and the two points relied upon are, first, that Mathuria Kuar is the next reversioner on the death of Tulsha; second, that the lower Courts have not found the plaintiffs to be the next reversioners, and that, if they are reversioners, which is denied, they are too remote to be entitled to attack the alienation made by Tulsha.

It will be observed that the decree of the first Court granted the plaintiffs a larger relief than that asked for in their petition of plaint. All they sought was to have their reversionary right declared and to recover their costs. It was incompetent for the Subordinate Judge to hold them entitled "to succeed to the estate on the death of Tulsha," and so far his decree and that of the Judge upholding it cannot be sustained and must be set aside. It appears to us, however, that there are some points in the suit which have not been made the subject of such clear and specific findings as to enable us in the present state of the case satisfactorily to deal with and dispose of the appeal before us. It is not sufficient to enable the plaintiffs to maintain their suit that they should be reversioners. It was in-

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cumbent upon them, before they could succeed, to establish that there were no nearer reversionary heirs than themselves, or that, if there were, those nearer heirs had precluded themselves from suing by colluding with and concurring in the alleged wrongful alienation by the widow. In the absence of any such collusion or concurrence the nearest reversioner would be that person who at the time of suit would succeed to the estate were the widow to die then and there. "The right to bring such a suit is limited and as a general rule belongs to the presumptive reversionary heir." If therefore the plaintiffs do not fall within this category and there are nearer reversioners, who have not colluded or connived with the widow in the manner already described, their "*status*" fails them and their claim cannot be entertained. But there is another matter which requires to be cleared up with regard to the precise position held by Mathuria Kuar It appears that Nidhi Lal died childless, leaving his widow, Tulsha, and his brother, Janki, father of Mathuria Kuar, surviving him It is admitted by the learned pleader for the appellants that, if Nidhi Lal's estate had been separately acquired, and had not become joint property of himself and his brother Janki, Mathuria Kuar would not rank as an heir, but that it would devolve at Tulsha's death on the nearest male surviving relative of Nidhi Lal. But it is contended that the estate of Nidhi Lal was joint; that Janki was his heir; and that Mathuria Kuar in this case would take the estate upon the death of Tulsha. It is, therefore, necessary that there should be a finding upon this point, as also in reference to the other matters already adverted to in this judgment. We accordingly remand the following issues to the lower appellate Court for determination under s. 566 of the Civil Procedure Code; should the Judge think it necessary to do so he may take additional evidence: (i Was the property alienated by the deed of gift of the 8th September, 1869, the joint property of Nidhi Lal and Janki, and enjoyed by them in common, or was it the self-acquired property of Nidhi Lal, and did it retain that character till his death? (ii) Have the plaintiffs proved that there are no nearer reversionary heirs than themselves to the estate of Nidhi Lal? (iii) If there are nearer reversionary heirs than themselves, who are they, and have they each and all of them precluded themselves from suing by colluding with and conniving at the alleged wrongful alienation by Tulsha?

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The findings when recorded will be returned into the Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

On the lower appellate Court returning its findings on these issues the High Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgment:—

STRAIGHT, J.—Upon the findings now returned it is established that Mathuria Kuar is the nearest reversionary heir, and that there is no collusion between her and Tulsha in respect of the alienation sought to be set aside by the suit. The determination of these questions of fact is in favour of the appellants, whose appeal must therefore prevail, and we accordingly decree it with costs.

Appeal allowed.

CIVIL JURISDICTION.

1881 *June* 28.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE COLLECTOR OF CAWNPORE AS MANAGER OF THE ESTATE OF SHEO RATAN, MINOR (DEFENDANT) *v.* KEDARI AND OTHERS (PLAINTIFFS).*

Suit for money had and received for plaintiff's use—Implied contract—Small Cause Court suit—Zamindari due.

A zamindar as such claimed and realized from a tenant Rs. 20, being one fourth of the price of trees cut down and sold by the tenant, basing his claim on general usage. The tenant sued to recover such money, denying that any such usage existed. *Held* that the suit was in the nature of one for money had and received by the defendant for the plaintiff's use, and therefore cognizable in the Court of Small Causes. *Lachman Prasad* v. *Chammi Lal* (1) followed.

THE manager of a certain estate under the superintendence of the Court of Wards, situated in the Cawnpore district, demanded and realized on behalf of the proprietor of such estate from the plaintiffs in this suit, who were tenants of such proprietor, one-fourth of the price of six trees which they had cut down and sold. Such demand was based on general usage as recorded in the *wajib-ul-arz* of such

* Application, No. 36 of 1881, for revision under s. 622 of Act X of 1877 of a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 30th November, 1880, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 25th August, 1879.

(1) *ante* p. 6.

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estate. These tenants brought the present suit against the proprietor of such estate, in the name of the Collector of Cawnpore as representing the Court of Wards, to recover the money, Rs. 20, so paid by them, alleging that the proprietor of such estate was not entitled by general usage to one-fourth of the sale-proceeds of trees cut down and sold by his tenants. The suit was instituted in the Court of the Munsif of Cawnpore. The defendant set up as a defence to the suit, *inter alia*, that the suit was not cognizable in the Munsif's Court but in the Court of Small Causes at Cawnpore. The Munsif disallowed this defence, and gave the plaintiffs a decree, which the Subordinate Judge of Cawnpore affirmed on appeal by the defendant.

The defendant applied to the High Court to revise the decrees of the lower Courts under s. 622 of Act X of 1877 on the ground, amongst others, that the suit was not cognizable in the Civil Courts but in the Court of Small Causes.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the defendant.

Munshi *Kashi Prasad* and Babu *Beni Prasad*, for the plaintiffs.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—We think that this was a Small Cause Court suit, and that the lower Courts erroneously entertained it. The plaintiff's claim was in the nature of one for money had and received by the defendant for the use of the plaintiff. The case of *Lachman Prasad* v. *Chammi Lal* (1), decided by us on the 10th June, 1881, is an analogous case, and we think that we may properly follow it in dealing with this application for revision. We therefore reverse the decisions of the Munsif and the Subordinate Judge with costs, and direct the plaint be returned to the plaintiff for presentation to the Small Cause Court.

(1) *ante* p. 6.

APPELLATE CIVIL.

1881
June 30.

Before Mr. Justice Tyrrell and Mr Justice Duthoit.

SULTAN AHMAD AND OTHERS (PLAINTIFFS) *v.* MAULA BAKHSH (DEFENDANT). *

Act X of 1877 (*Civil Procedure Code*), *s.* 13, *Ex. II.*

B, who held a decree for money against *I*, caused certain property to be attached in execution of such decree as the property of his judgment-debtor. *M*, the wife of *I*, objected to such attachment, claiming such property as her own. Her objection was disallowed, and she consequently brought a suit against *B* to establish her right to such property. She died while that suit was pending, leaving by will such property to her sons. That suit proceeded in the names of her sons, who claimed such property under such will. The lower Courts only decided in that suit that such property belonged to *M*, and not to *I*, and it was therefore not liable to be sold in execution of *B's* decree against the latter. They did not consider the question whether *M's* sons were entitled to such property under their mother's will. In second appeal in that suit *B* contended that *I*, as a heir to *M*, was entitled to a fourth share of such property, and such share was liable to be sold in execution of such decree. *M's* sons did not contend before the High Court that they were entitled to the whole of such property under their mother's will to the exclusion of *I*. The High Court allowed *B's* contention. *B* brought a fourth share of such property to sale in execution of his decree and purchased it himself. Thereupon *M's* sons sued him for such share claiming it under their mother's will. *Held* that their mother's will was a matter which should have been made a ground of defence by *M's* sons in the course of the trial of the second appeal in the former suit between them and *B*, and that, not having been so made, it was *res judicata* in the sense of s. 13, Explanation II, Act X of 1877.

MAULA BAKHSH, the defendant in this suit, who held a decree for money against one Imam Bakhsh, caused a certain house to be attached in execution of such decree as the property of his judgment-debtor. Objection to this attachment was taken by Mammo, wife of Imam Bakhsh and mother of the plaintiffs in this suit, who claimed such house as her own property. Her objection was disallowed, and she accordingly brought a suit against Maula Bakhsh to establish her right to such house. She died while that suit was pending, leaving by will such house to her sons. That suit proceeded in the names of her sons. They set up as a defence to it that they had succeeded to such house by virtue of their mother's will. The lower Courts only decided in that suit that such house belonged to Mammo and not to her husband, and that it was

* Second Appeal, No. 1353 of 1880, from a decree of C. J. Daniell, Esq. Judge of Moradabad, dated the 11th September, 1830, affirming a decree of Maulvi Amnud-din, Munsif of the City of Moradabad, dated the 2nd June, 1880.

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therefore not liable to be sold in execution of a decree against the latter. They did not consider the question whether Mammo's sons had succeeded to such house under their mother's will. The High Court decided on second appeal by Maula Bakhsh (Second Appeal No. 1346 of 1877, decided the 5th March, 1878,) that, as one of the heirs to his wife, Imam Bakhsh was entitled to one-fourth of such house, and such share was liable to be sold in execution of Maula Bakhsh's decree. Mammo's sons did not contend before the High Court that they were entitled to such house under their mother's will to the exclusion of their father. Maula Bakhsh having brought to sale one-fourth of such house in execution of his decree against Imam Bakhsh and purchased it himself, Mammo's sons instituted the present suit against him for possession of such share, claiming under their mother's will. The Court of first instance dismissed the suit on the ground that it was barred by limitation and that the will was not genuine. On appeal by the plaintiffs the lower appellate Court affirmed the decree of the Court of first instance on the ground that the plaintiffs might, when respondents in the second appeal in the former suit, have set up as a defence that they were entitled to the whole of such house under their mother's will, and Imam Bakhsh was not entitled to any share of it as an heir to their mother, and as they did not set up such defence, the question of their right under such will was *res judicata* under s. 13 of Act X of 1877.

The plaintiffs appealed to the High Court contending that such matter was not *res judicata.*

Mr. *Conlan* and Shah *Asad Ali*, for the appellants.

Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

TYRRELL, J.—Their mother's will was plainly a matter which should have been made a ground of defence by the respondents in the course of the trial here in the appeal No. 1346 between the same parties. It was not so made, and the lower appellate Court has rightly found that this plea must now be deemed to be *res judicata* in the sense of Explanation II, s. 13 of Act X of 1877. The appeal fails and is dismissed with costs.

CIVIL JURISDICTION.

1881
July 8.

Before Mr. Justice Straight and Mr. Justice Duthoit.

IN THE MATTER OF THE PETITION OF GAYA PRASAD *v.* SIKRI PRASAD.*

Application to amend decree—Act X of 1877 (*Civil Procedure Code*), *s.* 206—*Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 178.

An application to amend a decree, which is found to be at variance with the judgment, in accordance with the provisions of s. 206 of the Civil Procedure Code, is an application of the kind mentioned in No. 178 of sch. ii of Act XV of 1877, and as such subject to the limitation of three years.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The petitioner, who held a decree against one Sikri Prasad, made by the Subordinate Judge of Allahabad, applied to the Subordinate Judge for the amendment of such decree, in accordance with the provisions of s. 206 of Act X of 1877, on the ground that the judgment in the suit in which such decree was made stated that the costs incurred by the petitioner in such suit should be paid by Sikri Prasad, but such decree omitted so to state. The Subordinate Judge rejected this application on the ground that it was barred by limitation, as it was governed by art. 178 of sch. ii of Act XV of 1877, and more than three years had elapsed from the time when the right to make the application accrued.

Mr. *Spankie* (with him Babu *Beni Prasad*), for the petitioner, contended that art 178, sch. ii. of Act XV of 1877 did not apply to an application for the amendment of a decree under s. 206 of Act X of 1877. That article only applies to applications properly so called. The act of moving a Court to amend a decree is not an application within the meaning of that article, or of the Civil Procedure Code. It could not have been intended to limit the period within which a party might apply for amendment, and to allow the Court an unlimited period.

The *Senior Government Pleader* (Lala *Juala Prasad*), the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and

* Application, No. 66 of 1881, for revision under s. 622 of Act X of 1877 of an order of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad dated the 9th May, 1881.

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IN THE MATTER OF THE PETITION OF GAYA PRASAD v. SIKRI PRASAD.

Munshis *Hanuman Prasad* and *Ram Prasad*, for the opposite party.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,), so far as it is material for the purposes of this report, was as follows:—

STRAIGHT, J.—We are of opinion that the Subordinate Judge rightly held the petition for amendment of decree in accordance with the provisions of s. 206 of the Code to be an application of the kind mentioned in art. 178, sch. ii of Act XV of 1877, and as such subject to the limitation of three years.

FULL BENCH.

1881 *July* 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Duthoit.

UNKAR DAS (PLAINTIFF) *v.* NARAIN AND ANOTHER (DEFENDANTS).*

Pre-emption—Share of undivided mahál—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 10 —*Physical possession.*

A share in an undivided zamindari mahál is not susceptible of "physical possession" in the sense of No. 10, sch. ii of Act XV of 1877 Limitation, therefore, in a suit to enforce a right of pre emption in respect of such a share runs from the date of the registration of the instrument of sale

ON the 9th August, 1880, the plaintiff, a co-sharer in an undivided village called Bara Khera (a village in which the custom of pre-emption prevailed), instituted the present suit in the Court of the District Judge of Bánda against another co-sharer in that village, and a stranger to whom such co-sharer had sold his share, to enforce a right of pre-emption in respect of such share. The claim was founded upon the custom prevailing in Bara Khera. The instrument of sale was executed on the 2nd July, 1879, and was registered on that same day. The plaintiff averred that he had obtained possession of the property in suit in January, 1880. The vendee set up as a defence to the suit that it was barred by limitation. The District Judge allowed this defence, holding that a share of an undivided mahál was not capable of "physical possession" within the meaning of No. 10 of sch. ii of Act XV of 1877,

* First Appeal, No. 151 of 1880, from a decree of G. E. Knox, Esq., Judge of Banda, dated the 23rd September, 1880.

and limitation in this case consequently began to run from the date of the registration of the instrument. The plaintiff appealed to the High Court, contending, amongst other things, (i) that the lower Court had erred in computing the period of limitation from the date of the registration of the instrument of sale, and (ii) that the vendee had obtained physical possession of the property in January, 1880. The Division Bench (STRAIGHT, J., and TYRRELL, J.,) before which the appeal came for hearing referred the following questions to the Full Bench:—"Is a share of an undivided mahál susceptible of physical possession in the sense of art. 10, sch. ii of Act XV of 1877, and if so, what constitutes such possession."

Mr. *Siraj-ud-din*, Pandit *Ajudhia Nath*, and Munshi *Sukh Ram*, for the appellant.

Mr. *Simeon* and Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

STRAIGHT, J. (TYRRELL, J., and DUTHOIT, J., concurring).—We are asked whether a share in an undivided mahál is susceptible of "physical possession" in the sense of art 10, sch. ii, Act XV of 1877, and if so, what constitutes such possession? Assuming that by an undivided mahál is meant a pure zamindari tenure, we remark that a zamindari tenure has been defined as one "in which the whole land is held and managed in communion. The rents paid by the cultivators, whether the cultivators be the proprietors themselves or not, are thrown into a common stock, with all other profits from the estate, and after deduction of expenses, the balance is divided amongst the proprietors according to a fixed law." We believe that in most zamindari estates the division of profits takes place once a year only, and it is obvious that in times of severe agricultural distress the interval between one division of profits and another may well be even longer, and even a period of three or four years may elapse without any distribution taking place. While, therefore, a share in a zamindari estate no doubt represents an interest in land, it is plain that all that the transferee of such a right acquires is the title to demand profits in proportion to its extent at such time as division is made, or to compel a partition of that estate. In short, to employ a simple

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illustration, it represents the amount of a partner's interest in a partnership, in respect of which he is entitled to receive profits out of the common earnings. It seems to us that it would be straining matters to hold that the receipt of profits under such conditions from the lambardar would satisfy the expression "physical possession;" and indeed we find it impossible to conceive any possession of which a share in an undivided mahál is capable that could be said to be "physical" in the well understood acceptation of the term. Where a distinct parcel of land is sold by one person and bought by another, the vendee does obtain "physical possession" when he enters upon the land purchased, and there are like cases in which no difficulty need arise. But the position is altogether different as regards a share in an undivided mahál. In that case the right to receive profits vests in the purchaser from the time of sale, but such right can be materially enjoyed only at such time as the next division of profits may take place, and even such material enjoyment cannot be said to be physical possession of the "whole of the property sold," for the beneficial enjoyment acquired recurs at each subsequent division of profits. It is said that the alternative date sanctioned in column 3, art. 10 of sch. ii of Act XV of 1877, namely, "the registration of the instrument of sale," would enable cunning persons frequently to defeat the rights of pre-emptors by keeping a sale quiet until the twelve months from the date of registration had expired. We very much doubt whether it would be so, but this is certain that while, on the one hand, the object of the Legislature has been to shorten the periods of limitation, its purpose, on the other, has been to encourage registration, and it was probably under the influence of both these considerations that the word "physical" and the alternative provision in art. 10 above referred to were introduced. It was also contended that, if a share in an undivided mahál be held unsusceptible of physical possession, and the limitation as to it be declared to run from the date of the registration of the instrument of sale, where an interest of that kind of less value than Rs. 100 is transferred, no registration being necessary, or where the transaction is oral, the law would be found to prescribe no period of limitation at all as against a pre-emptor. There can be no doubt that this contention raises a question of much difficulty, but its discussion

does not fall within the limits of the question referred to us, and we therefore do not consider it necessary to determine it. We think that a share in an undivided mahál is not susceptible of "physical possession" in the sense of art. 10, sch. ii, Act XV of 1877.

STUART, C. J.—Without absolutely adopting all the reasons and arguments advanced in the judgment proposed by Mr. Justice Straight, I yet unhesitatingly concur in his conclusion that a share in an undivided mahál is not susceptible of "physical possession" within the true intent and meaning of art. 10, sch. ii of the present Limitation Act (XV of 1877). The point appears to me to be a very simple one, whether as regards the obvious nature of the right in question or the plain meaning of the limitation law applicable to it.

APPELLATE CRIMINAL.

1881
July 13.

Before Mr. Justice Straight and Mr. Justice Duthoit.

EMPRESS OF INDIA *v.* HARAKH NATH SINGH.

Escape from custody under process of Revenue Court—Exemption from arrest—Act X of 1877 (*Civil Procedure Code*), *ss.* 642, 651.

A Revenue Court is a "Court of Civil Judicature" within the meaning of s. 651 of the Code of Civil Procedure. A person, therefore, who escapes from custody under the process of a Revenue Court is punishable under that section.

S. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code."

Held, therefore, where a person, who had been convicted by a Magistrate and had been fined, was arrested in execution of the process of a Revenue Court while waiting in court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that, having escaped from custody under such arrest, such person had properly been convicted under s. 651 for escaping from "lawful custody."

ON the 30th July, 1880, Harakh Nath Singh was under trial before the Magistrate of Ballia on certain charges under the Penal Code. He was convicted on that date, and was fined Rs. 100. While waiting in Court for his friends to bring the amount of such fine, he was arrested in execution of a decree for arrears of rent made by a Revenue Court, and was committed to jail. On the

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way to jail he escaped from custody, and for such escape was convicted by the Magistrate of Ballia, under s. 651 of the Civil Procedure Code, and sentenced to pay a fine of Rs. 500. He appealed to the Sessions Judge of Ghâzipur, who held, thinking apparently that Harakh Nath Singh had been summoned as a witness when arrested, that his arrest was unlawful, being opposed to the provision of s. 642 of the Civil Procedure Code, and that being so, his escape from custody could not be punished under s. 651 of the Code, and acquitted him. The Local Government appealed to the High Court from the Sessions Judge's judgment.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Local Government.

Mr. *Ross*, for Harakh Nath Singh.

The Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgments :—

STRAIGHT, J.—I am of opinion that the provisions of s. 651 of the Civil Procedure Code are applicable to a person who escapes from custody under a warrant of a Revenue Court. For the purpose of this enactment it appears to me that Revenue Courts may be properly regarded as falling within the expression "Court of Civil Judicature," and now that resistance or illegal obstruction to lawful apprehension, or escape or attempt to escape from the custody under the process of the Civil Procedure Code, is made an offence, I cannot conceive any logical principle upon which Revenue Court process should have been excluded from a like protection. Seeing that the powers of arrest and committal vested in Revenue Courts are very extensive, it is difficult to understand why any distinction should be drawn in this matter between them and the Civil Courts. Looking at the very general terms of s. 651, "or under the warrant of any Court of Civil Judicature," it seems to me that they have been intentionally used for the purpose of including all Courts of civil in contradistinction to Courts of criminal procedure. I therefore think that the escape of Harakh Nath Singh from the Revenue Court peons in the present case was an offence, assuming him to have been "lawfully in custody," and that he was rightly convicted and punished by the Officiating Magistrate of Ballia. The question then

arises, was the arrest of Harakh Nath Singh, when he was attending the Magistrate's Court as an accused person, a legal and proper one? The determination of this point must turn upon whether the protection created by s. 642 of the Civil Procedure Code is by implication applicable to arrests under warrants of the Revenue Courts. Now it is to be remarked that the latter paragraph of that section, as it now stands, was introduced by Act XII of 1879, and that the words "Civil Court," as originally mentioned in Act X of 1877, have been altered to "tribunal," a comprehensive term, which I presume is intended to cover Criminal as well as Revenue and Civil Courts. It is unnecessary for the purposes of the present case to say anything with reference to the innovation that has apparently been introduced of exempting accused persons from arrest under civil process, though its policy and propriety may be open to question. But the effect of the amendment of s. 642 is to afford a general protection to the parties, which I understand to include prosecutors and accused persons, their pleaders, mukhtárs, revenue agents, and witnesses under summons, from arrest under any process issued under the provisions of the Civil Procedure Code, while going to, attending at, or returning from, any tribunal. It will be at once observed that the arrest from which these persons are protected is arrest under the Civil Procedure Code, which words would seem to create a clear limitation, and to exclude process under the Rent and Revenue Acts, though why such a distinction should be drawn is by no means intelligible. For it must be remembered that the privilege is the privilege of the Court and not of the individual, and it is difficult to see why, if the above-mentioned persons going to, attending at, or returning from, a Revenue Court are exempt from arrest under the Civil Procedure Code, there should not be an equivalent protection afforded them from revenue process when going to, attending at, on returning from, a Civil Court. Nevertheless there are the words "from arrest under this Code," and the only way in which the counsel for the respondent argues that the provisions of s. 642 can be made applicable to Revenue Court process is by the implication inferrible from the terms of s. 129 of the Rent Act. Upon examination of that section, however, I fail to find anything to bear out this contention. Exemption from arrest has nothing to

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do with the "law relating to the evidence of witnesses," nor to "the procuring the attendance of witnesses and the production of documents," nor to their "examination, remuneration, or punishment," and all I can remark is that, if the protection of s. 642 of the Civil Procedure Code was intended to comprehend arrest under Revenue Court process, it not only does not say so, but, by mention of arrest under the Civil Code alone, it seems to exclude it.

Such being the view I entertain, I think that Harakh Nath Singh was in lawful custody at the time he made his escape, and, therefore, that all the legal ingredients necessary to constitute the offence under s. 651 of the Civil Procedure Code were satisfied. This appeal by Government must accordingly be allowed, and the decision of the Judge reversed, the conviction and sentence of the Officiating Magistrate being restored.

The Judge's attention must be called to the blunder in his judgment, in which he speaks of Harakh Nath Singh as having been attending the Court of the Magistrate "as a witness." That such a mistake should have been made is scarcely consistent with that care and diligence which a Sessions Judge should employ when investigating an important criminal appeal, and this he should be told.

DUTHOIT, J.—This is an appeal on the part of Government from a judgment of acquittal passed by the Sessions Judge of Gházipur, regarding the respondent Harakh Nath Singh convicted summarily by the Magistrate of Ballia under s. 651 of the Code of Civil Procedure, and sentenced to pay a fine of Rs. 500, or in default to be simply imprisoned for six weeks. The facts of the case may be thus stated: On the 30th July, 1880, Harakh Nath Singh was under trial before the Magistrate of Ballia on charges under ss. 176 and 187 of the Indian Penal Code. He was convicted on that date, and was sentenced to pay a fine of Rs. 100. While he was waiting in Court for his friends to bring the amount of the fine, he was arrested in execution of a Rent Act decree, and was taken before the Revenue Court at Ballia, was committed to the civil jail at Gházipur (there is no jail at Ballia) for ten months, and on the same evening escaped from custody. For so doing he was convicted under s. 651 of the Code of Civil Procedure, and

was sentenced to pay a fine of Rs. 500. The grounds upon which the conviction was set aside are thus stated by the Sessions Judge: "The appellant was attending the Court of the Magistrate as a *witness* in a criminal case, and while there was arrested by some Revenue Court peons, on a decree passed against him. Under s. 642 this arrest was illegal and wrong, for it clearly says that 'witnesses acting in obedience to a summons' shall be similarly exempt, *i.e.*, from arrest. S. 651 says: 'Any one who escapes or attempts to escape from any custody in which he is lawfully detained under this Code, shall &c., &c.'; but as appellant was not lawfully arrested or detained, his escape from custody cannot be punished under this section."

Three questions arise for our decision in this case. (i) Whether the provisions of s. 651 of the Code of Civil Procedure are, or are not, applicable to the case of an escape from custody, when such custody is under Rent Act process? (ii) Whether the provisions of s. 642 of the Code of Civil Procedure are, or are not, applicable to an arrest under Rent Act process? (iii) Whether the provisions of s. 642 of the Code of Civil Procedure do, or do not, confer upon a person in the position in which Harakh Nath Singh was on the 30th July, 1880, privilege against arrest under civil process? Upon the first of these points I have no doubt. It has been argued that with reference to the terms of the preamble, and of s. 4 of Act X of 1877, and to the care shown by the framers of ss. 139 and 190 of Act XVIII of 1873, in specifying the particular points as to which the procedure of the Civil Code should be imported into procedure under that Act, the words "any Court of Civil Judicature," which are found in s. 651, Code of Civil Procedure, cannot denote a Revenue Court. But all that s. 4 of Act X of 1877 provides, *quoad* the Rent Act, is that, save under the circumstances stated, the Code shall not affect the rent law, and s. 651 does not affect Act XVIII of 1873; it supplements it only. And the answer to the plea raised on the wording of the preamble of Act X of 1877 seems to me the same. As regards ss. 139 and 190 of Act XVIII of 1873, I observe that the doctrine of "*expressio unius est exclusio alterius*" is scarcely a safe doctrine to apply to Indian legislation; that [cf. the quasi-repeal of s. 12,

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Act VII of 1870, by s. 588 of Act X of 1877, *Ajoodhya Pershad* v. *Gunga Pershad* (1)] if a conflict arise on a comparison of two enactments the one of later date must be followed; that we may not shut our eyes to the fact that a Revenue Court constituted under Act XVIII of 1873 is a "Court of Civil Judicature;" and that s. 92 of Act XVIII of 1873 specially declares that resistance of Rent Act process shall be punishable under the law for the time being in force for the punishment of resistance to Civil Court process. There is, as it seems to me, a marked comprehensiveness in the alternative words of s. 651, Code of Civil Procedure, "or any Court of Civil Judicature;" and looking to the fact that at the time when Act X of 1877 was passed there was no provision in the law [ss. 186 and 224, Penal Code, had been declared inapplicable] for the punishment of resistance to, or escape from, custody under any process of arrest other than that issued by a Criminal Court, I think that the words "Court of Civil Judicature" in s. 651 of that Act must have been intended to cover all Courts other than those of criminal jurisdiction. I hold, therefore, that the provisions of s. 651 of the Code of Civil Procedure do cover the case of an escape from custody, when such custody is under Rent Act process. The second question is, I think, one of much greater difficulty. For the respondent it has been contended that s. 92 of Act XVIII of 1873 expressly applies current Civil Court procedure to Rent Act processes; that if the Crown be allowed to take advantage, as against the respondent, of the provisions of s. 651 of the Code of Civil Procedure, it should also be made to concede to him the privilege of s. 642, which is to be found in the same part and same chapter of the Code; that although s. 642 appears in the concluding chapter of the Code, under the heading "Miscellaneous," yet it is really part of the law for procuring the attendance of witnesses; and that by the terms of s. 139 of the Rent Act the law for Courts constituted under that Act is the same in this respect as that which is in force in the Civil Courts. To this it is replied, on the part of the appellant, that the privilege conferred by s. 642 is privilege from arrest under such process only as may have been issued *under the Code of Civil Procedure*, and that the process under which

(1) I. L. R. 6 Calc., 250.

the respondent was arrested was issued, not under the Code of Civil Procedure, but under chapter VII of Act XVIII of 1873. After some hesitation I am of opinion that the appellant is right, and that there is no privilege against arrest in execution of Rent Act process. The respondent's case seems to me to rest mainly on the argument from the terms of section 139 of the Rent Act, and on the assumption that privilege from arrest is part of the law for procuring the attendance of witnesses; but I think that if this had been the intention of the framers of the Code, they would have placed the provision under chapter XIV, and not relegated it to chapter XLIX, and I think that it may well have been the intention of the framers of Acts XVIII and XIX of 1873 that there should be no privilege against Revenue (for if there be privilege against Rent Act process, it would surely have to be admitted as against Revenue Act process as well) or Rent Act process of arrest. There is no privilege against Criminal Court process. I hold that the provisions of s. 642 of the Code of Civil Procedure are not applicable to an arrest under Rent Act process. This being the view I take of the second point raised before us, it is perhaps unnecessary that I should discuss the third; but I may mention that although the Sessions Judge is in error in describing Harakh Nath Singh as a "*witness*" at the time of his arrest, I have no doubt that in the language of Indian legislation he would be correctly described as a "party," and that the word "tribunal," which under Act XII of 1879 has taken the place of the words "Civil Court" of the original s. 642, does include a Criminal Court. I do not think that the sentence passed upon Harakh Nath Singh is, under the circumstances of the case, unduly severe. I would, therefore, set aside the order of the Court of Session, and restore the conviction and the sentence passed upon the respondent by the Magistrate.

Appeal allowed.

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July 18.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Duthoit.

MUHAMMAD UMAR (JUDGMENT DEBTOR) *v.* KAMILA BIBI AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Amendment of revenue record—Application for execution not "in accordance with law"—Act XV of 1877 *(Limitation Act), sch. ii, No.* 179.

The holders of a decree made by a Civil Court, which directed *inter alia* that they should be maintained in possession of a share of a village, by cancelment of the order of the settlement officer directing the entry of the judgment-debtor's name in the revenue registers in respect of such share, applied for execution of such decree, improperly asking the Court executing the decree to order the Collector to amend such entry by the substitution of their names for that of the judgment-debtor in respect of such share, instead of asking it to send such officer a copy of such decree for his information, with a view to such amendment. *Held* that such application, not being one in accordance with law, within the meaning of No. 179, sch. ii of Act XV of 1877, was not one which would keep such decree in force.

KAMILA BIBI and Zainab Bibi held a decree against Muhammad Umar, bearing date the 6th December, 1875, which directed that they should be maintained in possession of a certain share of a certain village by cancelment of the order of the Settlement Officer directing the entry of the judgment-debtor's name in respect of such share in the revenue registers, and awarded them costs. On the 6th September, 1876, the decree-holders applied that in execution of this decree an order might issue to the Collector, directing the amendment of the settlement records, by the substitution of their names for that of the judgment-debtor. The Court executing the decree recorded a proceeding embodying the terms of this application, and directing that a copy of such proceeding and of the decree should be sent to the Collector, in order that he might make such necessary and proper changes as he thought fit. The decree-holders next applied for execution of the decree on the 3rd September, 1879, when they sought to recover the costs awarded by the decree. The Court executing the decree held that, inasmuch as the Civil Courts were prohibited by the High Court's Circular Letter No. 6, dated the 2nd June, 1870,

* Second Appeal, No. 20 of 1881, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 6th November, 1880, reversing an order of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 24th July, 1880.

from issuing orders to Revenue Courts, and were directed simply to forward copies of decrees for information, the application of the 6th September, 1876, was not an application "in accordance with law," within the meaning of No. 179 of sch. ii of Act XV of 1877, and therefore did not keep the decree in force, and the application of the 3rd September, 1879, was barred by limitation. On appeal by the decree-holders the lower appellate Court held that the application of the 6th September, 1876, kept the decree in force. Its reasons for so holding were as follows: "It is urged that such application was not 'in accordance with law,' as provided by cl. 4, art. 179, sch. ii of Act XV of 1877, and hence the application cannot save the period of limitation: I cannot accept this plea: the decree-holders certainly asked the Court to commit an act beyond its power, and the Court erred in complying with its request; but the last clause of the article referred to provides that the period of limitation runs from the date of applying to "take some step in aid of execution of the decree or order," and rightly or wrongly the decree-holders did take a step to show their desire to maintain the decree." The judgment-debtor appealed to the High Court, contending that the application of the 6th September, 1876, was not an application in accordance with law for execution, or a step in aid of execution, of the decree, within the meaning of No. 179, sch. ii of Act XV of 1877, and therefore the application of the 3rd September, 1879, was barred by limitation.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the appellant.

Lala *Lalta Prasad*, for the respondents.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

STRAIGHT, J.—We do not think that the application of the 6th September, 1876, was an application in accordance with law for execution, or a step in aid of execution, within the meaning of art. 179, sch. ii of Act XV of 1877, which provides the law that governs the present proceedings. The appeal is decreed with costs.

Appeal allowed.

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July 22.

Before Mr. Justice Straight and Mr Justice Tyrrell

SANGRAM SINGH AND ANOTHER (DECREE HOLDERS) *v.* BUJHARAT SINGH (JUDGMENT DEBTOR).*

Appeal by one of several defendants—Execution of decree—Application for execution against defendant who has not appealed—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179.

On the 11th July, 1877, a decree was made against *B* and *J*, the defendants in a suit, against which *J* alone appealed, such appeal not proceeding on a ground common to him and *B*. The appellate Court affirmed such decree on the 20th November, 1877. On the 23rd September, 1880, the holder of such decree applied for execution against *B*. *Held* that, so far as *B* was concerned, limitation should be computed from the date of such decree and not from the date of the decree of the appellate Court, and such application was therefore barred by limitation.

THE decree-holders in this case had sued one Bujharat Singh for certain immovable property. The latter did not defend the suit, but one Jagat Narain intervened, alleging that he was in possession as a mortgagee, and had been so for upwards of sixty years. He was accordingly made a defendant in the suit. On the 11th July, 1877, the Court of first instance gave the decree-holders a decree against both the defendants. Jagat Narain only appealed, and on the 20th November, 1877, the appellate Court affirmed the decree of the first Court. The decree-holders applied on the 23rd September, 1880, for execution of their decree against Bujharat Singh. The judgment-debtor objected to execution on the ground that the application was barred by limitation, more than three years from the 11th July, 1877, the date of the decree, having elapsed. The Munsif of Azamgarh, the Court executing the decree, decided that limitation ran from the date of the appellate decree, and therefore the application for execution was within time. On appeal by the judgment-debtor the Judge of Azamgarh decided that, as the appeal by Jagat Narain had not proceeded on a ground common to himself and his co-defendant, execution against Bujharat Singh, who did not appeal, ran from the date of the original decree, and not from the date of the appellate decree, and therefore the application for execution was barred by limitation. The decree-holders appealed to the High Court.

* Second Appeal, No. 34 of 1881, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 5th March, 1881, reversing a decree of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 8th January, 1880.

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SANGRAM SINGH v. BUJHARAT SINGH.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The Judge's view is correct. So far as Bujharat Singh was concerned, limitation began to run on the 11th July, 1877, the date when the unappealed decree was passed against him. It is exceedingly doubtful whether Jagat Narain could properly be a party to the suit, but this is certain that his appeal did not proceed on any ground common to himself and Bujharat Singh, against whom the decree-holder might have taken steps in execution, the decree in respect of him having become final. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Duthoit.

1881 *July* 22.

KHEM KARAN AND ANOTHER (DEFENDANTS) *v.* HAR DAYAL (PLAINTIFF).*

Suit against minor—Appointment of Guardian ad litem—*Suit when instituted—Act XV of* 1877 (*Limitation Act*), *s.* 4—*Pre-emption—Minor—Estoppel.*

A suit to enforce a right of pre-emption in respect of a share of an undivided village was instituted against the vendor and the purchaser, the latter being a minor, on the 1st June, 1880. The instrument of sale was registered on the 9th June, 1879. On the 14th June, 1880, the Court in which such suit was instituted made an order appointing a guardian for such suit for the minor purchaser. *Held*, having regard to the provisions of s. 4 of Act XV of 1877, and *Ram Lal* v. *Harrison* (1) and *Stuart Skinner* v. *William Orde* (2), that, for the purposes of limitation, such suit was instituted, as regards the minor purchaser, on the 1st June, 1880, when the plaint was first presented, and not on the 14th June, 1880, when the order appointing a guardian for such suit for him was made, and such suit was therefore within time.

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* First Appeal, No. 119 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 10th August, 1880.

(1) I. L. R. 2 All. 332.
(2) I. L. R. 2 All. 241; S. C., L. R. 6 Ind. App. 126.

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The vendees in a suit to enforce a right of pre-emption set up as a defence to the suit that the sale was invalid, on the ground that they were minors and therefore incompetent to contract. *Held* that, as they had paid their money to the vendor, and the conveyance had been perfected, and they were in possession of the property, they were estopped from urging such ground.

THE plaintiff, a co-sharer of a certain undivided village, sued to enforce a right of pre-emption in respect of a share of such village. The suit was instituted on the 1st June, 1880 The instrument of sale was dated the 9th June, 1879, and was registered on that day. After the suit was instituted the plaintiff discovered that the purchasers, Ganesh Rai and Daulat Rai, were minors. An order appointing guardians for the suit for the minors was made on the 15th June, 1880. The defence set up on behalf of the minor defendants was that the suit was barred by limitation, inasmuch as, regard being had to the provisions of s. 444 of Act X of 1877, the suit was not legally instituted against them until the 15th June, 1880. The Court of first instance disallowed this defence, and gave the plaintiff a decree. The minor defendants appealed to the High Court, again contending that the suit was barred by limitation.

Mr. *Howard* and Babu *Baroda Prasad Ghose*, for the appellants.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

STRAIGHT, J.—The main point relied upon by the learned counsel for the appellants is contained in the first three pleas taken in appeal. It is in substance that the suit must be held barred by limitation, because although the plaint was presented on the 1st June, 1880, yet the minor defendants were not formally and properly brought upon the record by their guardian until the 14th of that month. It was ingeniously contended that, the minors, in point of law, being absolutely disqualified from figuring on their own behalf in the litigation, no suit in reality was instituted until the date of the guardian's appointment. If this was so, the sale

impeached having taken place on the 9th June, 1879, the sale-deed being registered on the same day, art. 10, sch. ii of Act XV of 1877 barred the claim. We cannot accede to this view. The objection taken, while professing to be one of limitation, really goes to the validity or otherwise of the plaint, and it is too late to consider any question of that kind now. If the plaint was irregular or defective, it might have been attacked, as provided in Chapter V of the Civil Procedure Code. This, however, was not done, though had that course been followed, we doubt if the grounds now put forward would have demanded more than the amendment or the return for amendment of the plaint. In such a case the limitation would have counted, not from the date of the amendment or re-presentation, but from the date when the plaint was first presented.—*Ram Lal* v. *Harrison* (1). So with respect to an application to sue *in formâ pauperis*, the suit is regarded as instituted when the petition to sue as a pauper is filed.—Exp., s. 4 of Act XV of 1877, and see *Stuart Skinner* v. *William Orde* (2). We think therefore that the plain directions of the law that a suit is instituted, "when the plaint is presented to the proper officer," are conclusive against the arguments of the appellants' counsel, and that his plea of limitation fails. It may be as well to add that we have refrained from referring to the provisions relating to minors contained in Chapter XXXI of the Code, as they do not appear to us to have any bearing upon the simple question of the construction to be placed upon a particular section of the Limitation Law.

The only other point urged was that, as the sale-deed impeached was executed to the minors in their own names, they being incompetent to contract, the transaction was invalid, and therefore no claim for pre-emption could arise. This ground was not taken in the lower Court, and it certainly does not lie in the mouths of the minors to urge it now. They have paid their money to the vendor, the conveyance of the property has been perfected, and they are admittedly in possession of it. The appeal therefore wholly fails and must be dismissed with costs.

Appeal dismissed.

(1) I. L. R., 2 All. 832.
(2) I. L. R., 2 All. 241; S. C., L. R., 6 Ind. App. 126.

1881
May 16.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

MAN BHARI (PLAINTIFF) *v.* NAUNIDH (DEFENDANT).*

Registration—Omission to endorse signature of person admitting execution—Validity of registration—Act VIII of 1871 (Registration Act), ss. 68, 85—Hindu law—Gift—Possession—Construction of instrument of gift.

S, on the 23rd September, 1874, executed an instrument of gift in favour of his two daughters and his adopted son, whereby he gave them "his houses and shops, and other moveable and immoveable property, and his loan transactions" in equal one-third shares. At this time he was possessed of a one-third share in a certain partnership business. As *S* was unable to appear at the registration office, by reason of sickness, *N*, his adopted son, on the same day presented such instrument for registration, and applied for the issue of a commission for his examination, which the registering officer issued. The commissioner went to *S's* house on the next day, but before he arrived *S* had died. He examined the attesting witnesses to such instrument, who stated that it had been executed by *S*, and he was informed by *N* that it had been so executed. On the next day *N* and the attesting witnesses and the writer of such instrument appeared before the registering officer, and the witnesses and writer were examined by him. Being satisfied that *S* had executed such instrument, the registering officer admitted registration, recording that the execution was admitted by *N*. *N's* signature was not endorsed on such instrument. *M*, one of *S's* daughters, subsequently sued *N* for one-third of her father's property, including his share in such partnership business, basing her suit on such instrument. *Held* that, inasmuch as *N* had admitted at the time of registration of such instrument that it had been executed by *S*, its registration was not invalidated by the mere fact that *N's* signature had not been endorsed thereon. Also that, inasmuch as the donor had relinquished the subject of the gift, so far as he could, and had vested it in the donees, possession under the gift had passed to *M*. Also, on the construction of such instrument, that it did not give *M* a share in her father's partnership business.

THE plaintiff in this suit, Man Bhari, was one of the two daughters of one Sarni Mal, who died on the 24th September, 1874. The defendant, Naunidh, was Sarni Mal's adopted son. The plaintiff claimed a one-third share of a certain house and of certain shops, situate at Meerut, the property of her deceased father, and also a one-third share of her deceased father's interest in a partnership business which he had carried on at Meerut jointly with one Ramkaran Das and one Ram Prasad. She founded her claim on a deed executed by her father on the 23rd September, 1874, the day before he died, whereby, she alleged, he had made a gift of the whole

* Second Appeal, No. 877 of 1880, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 21st May, 1880, reversing a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 3rd April, 1880.

of his property in equal one-third shares to the defendant, his adopted son, and his two daughters. The terms of this deed, which was registered, were in effect as follows:—"I Sarni Mal own houses and shops in the Sudder Bazar and Regimental Bazar, Meerut: up to this time I am in exclusive possession of this property: while in full possession of my senses and without coercion I give the whole of my property, that is to say, my houses and shops and other moveable and immoveable property, and my loan transactions, in equal shares to my adopted son Naunidh, my daughter Man Bhari, and my daughter Gaura: the three donees are proprietors of my property in equal one-third shares." This deed was registered, as appeared from the endorsement made on it by the registering officer, dated the 25th September, 1874, under the following circumstances. It was presented for registration on the 23rd September, 1874, by the defendant Naunidh, by reason of the illness of Sarni Mal, the executant, and the defendant prayed that a commission might issue, under the provisions of s. 38 of Act VIII of 1871, for the examination of the executant as to the execution of the deed and to take evidence as to his identity. The registering officer issued a commission on the same day for this purpose. The commissioner proceeded on the next day to the house of the executant, but before he arrived the executant had died. The defendant informed the commissioner that his father had executed the instrument, while in full possession of his senses, before the attesting witnesses, and that one Mannu Lal was the writer of the instrument, and it had been executed before him. The commissioner took the statements of the two attesting witnesses. On the next day, the 25th September, these witnesses and the defendant appeared before the registering officer, and the witnesses acknowledged before the registering officer that their statements were correct, and further stated that Sarni Mal was in full possession of his senses when he executed the instrument, and that he executed it with his own hand. The writer of the instrument also appeared before the registering officer, who was well acquainted with him, and confirmed the statements of the attesting witnesses. The registering officer thereupon registered the instrument, recording that the defendant admitted its execution. The defendant's signature was not endorsed on the instrument. After the instrument was registered, it was returned by the registering officer to the defen

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dant. The plaintiff alleged in further support of her claim that she had been in possession for two or three years of some of her father's property, but that for two years before the suit the defendant had taken possession of the whole of it. The defendant contended that the deed of gift was not admissible in evidence, as it had not been duly registered, and that the gift was invalid under Hindu law, as the plaintiff had not at any time obtained possession under it; and that the deed did not give the plaintiff any interest in her father's partnership business. The Court of first instance disallowed the defendant's first contention, but allowed his second; and, giving the plaintiff a decree in respect of the house and shops in suit, dismissed her suit as regards the partnership business. Both parties having appealed, the lower appellate Court dismissed the suit on the ground that the deed was not admissible in evidence, as it had not been duly registered, and that the gift was invalid, under Hindu law, as the plaintiff had not obtained possession under it.

On second appeal by the plaintiff it was contended on her behalf that the deed of gift had not been unduly registered; that it was proved that the plaintiff had obtained possession under the gift; and that she was entitled under the gift to share in the partnership business.

Mr. *Dillon* and Babu *Oprokash Chandar Mukarji*, for the appellant.

Mr. *Colvin* and Pandit *Nand Lal*, for the respondent.

The Court (STUART, C. J., and SPANKIE, J.) delivered the following

JUDGMENT.—The plaintiff sued to obtain possession by division of ⅓ of a house and certain shops and of an interest in the business concern of the firm belonging to Sarni Mal, father of the parties, deceased. The plaintiff, Man Bhari, rested her claim on a deed of gift by her father Sarni Mal, dated 23rd September, 1874, and by which deed of gift he divided his entire property among three persons, Naunidh his adopted son, and his two daughters Gaura and Man Bhari, in equal shares of one-third each. The father died the next day, that is on the 24th September, 1874, and the plaintiff asserts that on his death she had possession of a portion of the property for two or three years; for the last two years

defendants have held possession. The defendant Naunidh contended that the deed of gift was invalid, for the donor was no party to its registration which was effected after his death, on the evidence of witnesses: the registration was illegal: the plaintiff too never had possession under it: he (Naunidh) was the adopted son of deceased and daughters could have no claim as against him: under any circumstances, the plaintiff had no claim to any interest in the business of the firm. Gaura admitted the plaintiff's claim.

The first Court found that the deed of gift shows, by endorsement, that it was presented for registration by petition on the part of Sarni Mal, filed through his adopted son Naunidh, Rs. 10 being paid into Court as the cost of a commission, the donor being unable to attend in person by reason of sickness. A commissioner was appointed to examine him. It was found that the donor was dead. But under instructions from the Registrar the commissioner made inquiries as to the execution of the deed from the subscribing witnesses, who were pointed out to him by Naunidh, the adopted son. On his submitting a report, the witnesses acknowledged before the Registrar the fact that Sarni Mal had executed the deed, whilst in possession of his senses, and had signed it with his own hand. There was nothing irregular in this registration, which was effected under the management of Naunidh, the adopted son and an assign of the deceased. The first Court also held that Naunidh, defendant, had recognised the interest possessed by the plaintiff under the deed, for since his father's death he had paid Rs. 40 or 50 yearly to the plaintiff. But the Subordinate Judge did not admit that plaintiff was entitled to any share in the firm by the terms of the deed of gift. Both plaintiff and defendant appealed to the Judge. The defendant contended that the registration was not made on his admission: the duties under s. 35 could not be performed by a registry muharrir: the proceedings in registration were illegal and the claim should have been dismissed: the payment of money to the plaintiff, his (defendant's) sister, out of affection, is no proof of possession of the property. The plaintiff urged that the deed included moveable property in the firm: the account-books showed that she had received money out of the profits of the firm. The Judge holds that there is no proof that the provisions of the law

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in respect to registration were carried out, and also that it was not shown that the deed of gift had been carried out or possession given. He observes that the representative of the executant did not appear before the Registrar to admit the execution. The document was filed and a request made for a commissioner to verify the deed, as executant was in a state of great weakness. When the commissioner reached the executant's house, the latter was dead, and the Sub-Registrar took evidence as to execution and ordered the registration. But the representative did not admit the execution. As to the money paid by defendant to plaintiff, the Judge accepts the former's statement and considers that it is a proof that plaintiff did not obtain possession. He finds "the gift too weak and incomplete to support the award" (decree), which he accordingly reverses.

The plaintiff-appellant urges that the proceedings before the Registrar were valid: immediate possession was not necessary under the Hindu law. She further urges that the payment of money to her was a proof of her possession, and that the first Court had misapprehended the deed in relation to the interest in the firm. We fail to find that there was any illegal procedure on the part of the registering officer. He was satisfied that, owing to bodily infirmity the executant could not appear, and at the instance of the son, who presented his father's petition and prayed for a commission, he granted that prayer. S. 38 of the Registration Act would cover this proceeding. It further appears that, when the commissioner went to the executant's house, which he did without delay, that is to say, on the next day, it was found that he had died, though he was alive when the petition for registration was presented to the Sub-Registrar. The Judge states that the representative did not admit the execution. But the Subordinate Judge's statement as to the endorsements on the deed of gift have never been denied, and the conduct of Naunidh from the time he presented the deed for registration, also during the time when the commissioner was at the executant's house, and was making inquiries as to the execution, and subsequently before the Sub-Registrar, shows that the endorsement was true, and that the execution of the deed was admitted by Naunidh. If the actual words of

admission have not been recorded, still there cannot be a doubt that in good faith the Registrar understood him to admit the execution, and therefore any irregularity, if there was any, would not invalidate the procedure (s. 85, Registration Act). The registration, not being invalid, is a fact, and admits the deed of gift as evidence. The deed of gift, however, would not have been necessarily null and void, because it was not registered, though plaintiff could not have made use of it in the suit for want of registration.

As to possession, the finding of the lower appellate Court appears to be opposed to all the evidence in, and circumstances of, the case: all that the donor could do, he did. To show what he intended by the deed, which he himself signed, to divest himself of the property, he gave it over to the adopted son, who took one-third of the property included in the deed, for the purpose of having it registered. He desired to be examined by commission, in order that he might publicly avow and verify it. The parties interested in the deed were his adopted son and daughters, and so far as he could do so, the donor relinquished the property, and vested it in the donees, and its registration shows that the donees accepted their shares of the property.—See *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (1) and *Tara Chand* v. *Gulab Gir* (2). The lower appellate Court has assigned no reason for disbelieving the evidence of the witnesses, and its argument, that the payment annually of Rs. 40 or Rs. 50 by Naunidh to the plaintiff is a proof that the deed of gift was not carried out, is manifestly opposed to all the facts of the case which cannot be disputed. As long as the plaintiff understood from the defendant's acts that he recognised her right and title under the deed of gift, she would be satisfied. When he ceased to acknowledge her right and interest in the property, she came into Court and did so within the time allowed by law. Now as to the appeal in regard to the business of the firm. It is urged that the first Court misconstrued the deed and that its terms do include this portion of the property. But we agree with the first Court that it does not do so. There was good reason why the father should make a provision for the women, though it did not follow that he should give them an

(1) 4 B L R., O. C. J. 103.
(2) Appeal No. 5 of 1878 under s. 10, Letters Patent, decided 30th May, 1879, unreported.

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interest in the firm, which he had carried on jointly with Ramkaran Das and Ram Prasad. The deed, we think, if it had intended to give them a share in the firm, would have expressed the intention as clearly as it refers to other property. We think it unnecessary to remand the case to the lower appellate Court for any further inquiry on this point. No advantage could be expected from our doing so, and appellant has asked us to construe the document, which we have done, with a result that is unfavourable to her and affirms the Subordinate Judge's view of it. We decree the appeal and reverse the decree of the lower appellate Court, so far as to restore the decree of the Subordinate Judge, with costs in proportion to decree and dismissal.

Appeal allowed.

APPELLATE CRIMINAL.

1881
May 25.

Before Mr. Justice Spankie and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* MOHAN LAL AND ANOTHER.

Confession—Proof of oral confession—Act I of 1872 (*Evidence Act*), *s* 24—*Confession to "panchayat" caused by threat.*

The matter before a "panchayat" was whether *M* and *K* had murdered *B*, and thereby disqualified themselves from further intercourse with the rest of their brotherhood. *M* and *B* made certain statements before the *panchayat*, which it was afterwards sought to prove against them on their trial for the murder of *B* as confessions corroborating the evidence of an approver. The witnesses called to prove these "confessions" did not state specifically what was said by *M* and *K* before the *panchayat*. One witness, a member of the *panchayat*, said: "*M* confessed and *K* acquiesced" Another witness, also a member of the *panchayat*, said: "*M* and *K* were taxed with taking *B's* house, upon which both admitted having murdered him." The same witness also said: "The admissions were not taken down." It appeared that it was not till at the sixth meeting of the *panchayat*, and when *M* and *K* were threatened with excommunication from caste for life, that they made such statements. *Held* that, if the statements attributed to *M* and *K* had been actually made, and assented to, and this fact had been duly proved, the provisions of s. 24 of Act I of 1872 could not be pleaded against their admissibility on the ground that such statements had been caused by such threat, for the members of the *panchayat* were not in authority over *M* and *K* within the meaning of that section, nor was there any threat made having reference to any charge against them. The statements, however, could not be accepted as sufficient in themselves to corroborate the evidence of the approver, or to support the conviction of *M* and *K* for the murder of *B*. The statements were in general

terms and represented only the impression conveyed by what might have been said to the mind of the witnesses. It was always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were said. It might have been that the words ascribed to *M* and *K* taken with the questions put and the exact subject-matter of the inquiry did not amount to a confession of the guilt believed by the hearers to have been confessed

THIS was an appeal from a judgment of Mr. H. G. Keene, Sessions Judge of Meerut, dated the 27th April, 1881, convicting the appellants, Mohan Lal and Kishan Lal, of the murder of one Bhagwan Das. The appellants and Bhagwan Das were by caste Banias. The evidence against the appellants consisted in part of confessions, which it was said they had made of having murdered Bhagwan Das. These so-called confessions were made by them before a *panchayat* of their caste brethren, which had been convened by Nait Ram, the brother of Bhagwan Das, to investigate the fact of his brother's death and the possession of his house and property by the appellants. Nait Ram had convened this *panchayat*, as he had received information which had led him to believe that the appellants and Bhimraj, Bhagwan Das's son, had, in concert, murdered Bhagwan Das. The members of this *panchayat* found the appellants and Bhimraj guilty of the murder of Bhagwan Das, and sentenced the appellants to excommunication for eight years, and Bhimraj, who failed to appear before them, to excommunication for life. At the trial of the appellants the prosecution relied on these confessions as corroborating the evidence of Bhimraj, who had turned approver. The witnesses called to prove these confessions did not state specifically what was said or admitted before the *panchayat* by the appellants. One witness, a member of the *panchayat*, said: "Mohan Lal confessed and Kishan Lal acquiesced." Another witness, also a member of the *panchayat*, said: "Mohan Lal and Kishan Lal were taxed with taking Bhagwan Das's house, upon which both admitted having murdered him." The same witness also said: "The admissions were not taken down, nor did Mohan Lal and Kishan Lal sign the sentence." It was also in evidence that it was not till at the sixth meeting of the *panchayat*, and when the appellants were threatened with excommunication for life, if they would not confess, that they made admissions.

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Mr. *Colvin* (with him Mr. *Spankie*), for the appellants, contended, *inter alia*, that these confessions became irrelevant as against the appellants by reason of this threat or inducement held out to them, and that such confessions could not be accepted as sufficient in themselves to corroborate the evidence of the approver or to support the convictions of the appellants for the murder of Bhagwan Das. He cited *Queen* v. *Soobjan* (1).

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The judgment of the High Court (SPANKIE, J., and TYRRELL, J.), so far as it related to this contention, was as follows :—

TYRRELL, J.—It was argued that these confessions became irrelevant as against the accused persons by reason of this threat or inducement, but it does not appear that the provisions of s. 24 of the Evidence Act are applicable to the circumstances before us. If the confessions said to have been made before the *panchayat* had been shown to have been clear admissions of the appellants' guilty knowledge of, or participation in, the murder of Bhagwan Das, made by the appellants in the presence of other persons, and when they were not in the custody of the police, or accused of this murder, they would be extra-judicial confessions, and would if proved be admissible against them, subject to the provisions of the Evidence Act as to the admission of confessions. If the statements attributed to the appellants had been actually made, and assented to, and this fact had been duly proved, the provisions of s. 24 of the Evidence Act could not be pleaded against their admissibility, for the members of the *panchayat* were not in authority over Mohan Lal and Kishan Lal within the meaning of that section, nor was there any threat, inducement or promise, made having reference to any charge against the accused persons. The matter before the *panchayat* was whether or not these two persons had by their acts disqualified themselves from further social intercourse with the rest of the brotherhood. It is, however, sufficient for the purposes of this appeal to find that these statements cannot be accepted as sufficient in themselves to corroborate the evidence of the

(1) 10 B L R, 332.

approver or to support the conviction of the appellants for the murder of Bhagwan Das. The statements ascribed to the appellants are in general terms, and represent only the impression conveyed by what may have been said to the mind of the witnesses. It is always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were said. It may have been that the words ascribed to the appellants taken with the questions put and with the exact subject matter of the inquiry did not amount to a confession of the guilt believed by the hearers to have been confessed.

MATRIMONIAL JURISDICTION.

1881
June 17.

Before Mr. Justice Straight.

DEBRETTON (PETITIONER) *v.* DEBRETTON (RESPONDENT) AND HOLME (CO-RESPONDENT).

Suit for dissolution of marriage on the ground of wife's adultery—Evidence of adultery—Co-respondent—Act IV of 1869 (*Divorce Act*), *ss* 51, 52.

The co-respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery was summoned by the petitioner in such suit as a witness. The Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with, him to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held*, under such circumstances, that the co-respondent had not "offered" to give evidence, within the meaning of s. 51 of the Indian Divorce Act, 1869, and therefore his evidence was not admissible.

THIS was a petition by Charles James DeBretton for the dissolution of his marriage with Florence Emma DeBretton on the ground of her adultery with one Charles Henry Holme. The petitioner did not himself make the alleged adulterer a co-respondent to his petition, but on the day fixed for the settlement of issues the Court made him a co-respondent on the application of the respon-

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dent's counsel. On the hearing of the petition the co-respondent, who had been summoned to attend and give evidence on behalf of the petitioner, was called, and appeared, and was sworn. The respondent's counsel objected to the examination of the co-respondent on the ground that he had not offered himself as a witness, but had been summoned to attend and give evidence. This objection was overruled on the ground that the co-respondent had not himself offered any objection to be sworn, and his examination must therefore proceed. Having been examined as to when and the manner in which he made the acquaintance of the respondent, and the nature of such acquaintance, the co-respondent was asked the following question: "Have you had sexual intercourse with the respondent in this case."? The respondent's counsel objected to this question, but the Court held that it might be asked, as the objection, if well-founded, did not lie in the mouth of the respondent's counsel, but was the privilege of the witness himself. The co-respondent thereupon asked the Court if he was bound to answer the question. The Court held that he was bound to do so, being of opinion that there was no restriction in the Indian Divorce Act as to the questions that might be put to parties under examination. The co-respondent then replied to the question, admitting that he had had sexual intercourse with the respondent on several occasions.

Mr. *Spankie*, for the respondent, at the final hearing of the case, contended that the evidence of the co-respondent was not receivable. The co-respondent did not "offer" himself as a witness, but was compelled to appear. Under the Indian Divorce Act, unless a party "offers" himself or herself as a witness, he or she cannot be compelled to give evidence of or relating to adultery —see ss. 51, 52. Nothing contained in the Indian Evidence Act affects this rule.

Mr. *Howard* (with him Mr. *Hill*), for the petitioner.

The judgment of the Court, so far as it related to the admissibility of the evidence of the co-respondent, was as follows:—

STRAIGHT, J. (after stating that the question was whether the petitioner had satisfactorily established that the relations of Mrs.

DeBretton and Mr. Holme were of a criminal character, continued :) This question necessarily brings me to the consideration of the most serious and difficult point raised in the case, namely, whether the evidence of Mr. Holme was given under such circumstances as to make the second paragraph of s. 51 of the Indian Divorce Act applicable to him. Now it must be observed that he did not present himself voluntarily for examination, but was brought by *sub pœnâ* from the petitioner. It is true that he made no objection to being sworn, and that to a certain point in his evidence he answered the questions addressed to him without hesitation. It was not until the petitioner's counsel put to him: "Have you had sexual intercourse with the respondent in this case?" and the counsel for the respondent objected, and I overruled his objection, that the witness asked me if he was bound to answer that question. I was at the time of opinion that, having taken the oath without objection, the privilege being his privilege and not that of the respondent, he had offered himself as a witness, and that there being no restriction in s. 51 of the Indian Divorce Act as to the questions to be put to the party so offering himself as a witness, he was bound to answer the petitioner's counsel, and I so told him. Upon further consideration, however, I have come to the conclusion that this view was an erroneous one, and that I ruled wrongly in telling the witness he was bound to answer the question. The provisions of the law upon this point are contained in the s. 51 already referred to, and the words are: "Any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witness." The co-respondent of course was a "party" to the suit, but he was not a volunteer, for he was brought by *sub pœnâ*, and I think that in asking me if he was bound to answer the question, it must be taken that he objected to answer, and would have declined had I not told him he was bound to do so. Seeing that he was summoned by the petitioner, and was in no sense a volunteer, I do not think he can properly be said to have "offered" himself in the manner contemplated by s. 51 of the Indian Divorce Act, and I ought to have explained to him, before he was sworn, that it was not compulsory upon, but optional with, him, whether he should give evidence or not. But it was urged by the counsel for the peti-

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tioner that since s. 120 of the Evidence Act has come into operation, the position of parties to divorce suits has been materially altered, and that they are now competent witnesses in all divorce proceedings. He further contended that by s. 132 of the Evidence Act they could not be excused from answering questions on the ground that their answers might criminate them. But the competency of the witness is one thing and the power to compel him to give evidence another. At one time the parties to divorce suits in England, on the ground of adultery, were incompetent witnesses, and practically remained so until 1869, when 32 and 33 Vict., c. 68, was passed, which declares them "competent to give evidence in such proceedings: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." So in the Indian Divorce Act, by s. 52, when the suit is by a wife praying that the marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable "to give evidence of or relating to such *cruelty* or *desertion*." Now it must be remarked that it is as to the cruelty or desertion only that they are competent and compellable witnesses, and not as to adultery, and further that they are only competent and compellable in a suit by the *wife* against the husband for dissolution of marriage on the ground of adultery with cruelty or with desertion. In all other suits they are competent witnesses in the sense that, if they "offer" themselves, as provided by s. 51, they may be examined, cross-examined and re-examined like any other witness. The condition precedent is, that they offer themselves, and when once they have done that, there seems to be no such protection afforded them as is provided by the English Act. No doubt the case primarily contemplated by s. 51 was that of the parties tendering themselves to deny the alleged act or acts of adultery, and in that event they would in England, as here, be liable to be asked and bound to answer questions in cross-examination tending to show they had been guilty

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of adultery. Looking at the Indian Divorce Act along with the Evidence Act, I do not think that, where there are such special and distinct provisions as those contained in ss. 51 and 52 of the former Act, which in all other respects is in full force, ss. 120 and 132 of the latter Act can be treated as practically repealing them. The question therefore is not whether Mr. Holme was a competent witness, but whether he "offered" himself as a witness within the meaning of s. 51. For the reasons I have already given I am of opinion that he did not "offer" himself, and such being the view I entertain, his evidence must be regarded as struck out, and should not be taken into consideration in determining the questions at issue between the parties. It will of course remain upon the record, and should an appeal be preferred, it will, if the appellate Court holds me to have erroneously rejected it, be available material to assist it in forming a judgment upon the merits of the case.

CRIMINAL JURISDICTION.

1881 *June* 26.

Before Mr. Justice Duthoit.

EMPRESS OF INDIA *v.* RUKN-UD-DIN.

Witness for the defence—Failure to attend—Refusal to re-summon—Act X of 1872 *(Criminal Procedure Code), s.* 359.

On the 30th March, 1881, an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused an application by the accused for the issue of a second summons to such witness, with reference to s. 359 of Act X of 1872, on the ground that such application was not made in "good faith." *Held* that the provisions of s. 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness.

THIS was an application to the High Court by one Rukn-ud-din to revise under s. 297 of Act X. of 1872 an order of Mr. F. H. Fisher,

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Magistrate of the first class, Saharanpur, dated the 18th April 1881, convicting him of an offence under s. 411 of the Indian Penal Code. The applicant sought revision of this order on the ground, amongst others, that the Magistrate had improperly refused to re-summon a person who had been summoned as a witness for the applicant's defence, but who had failed to attend. The facts of the case are sufficiently stated for the purposes of this report in the order of the High Court.

Mr. *Amir-ud-din*, for the applicant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

DUTHOIT, J.—On the 30th March, 1881, the accused person asked that a certain witness (Abdul Karim) might be summoned to give evidence in his behalf, and to produce certain papers and accounts. Summons was ordered to be issued for his attendance on the 18th April, which date was fixed for the hearing of the case. But there seems to have been some delay in the service of summons, and on the 18th April the witness did not attend. On that date the Magistrate recorded the following order: "To-day was fixed for the return to the requisition made on the Nahun State for the attendance of Abdul Karim: no reply has been received: it is evident that the accused has only named this man as a witness for purpose of delay: under s. 359 I refuse to issue a second requisition, as I do not think that the application is one made in good faith." The provisions of s. 359 of the Code of Criminal Procedure are clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was, I consider, bound to make a further attempt—the first attempt seems to have been nominal merely—to secure the attendance of the absent witness. The conviction of Rukn-ud-din is set aside. The trial will be re-opened. Every endeavour to secure the attendance of the witness Abdul Karim, with the papers called for by the accused, must be made, and the case must then be disposed of according to law.

APPELLATE CIVIL.

1881
June 30.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PAHLWAN SINGH (PLAINTIFF) *v.* RISAL SINGH AND ANOTHER (DEFENDANTS).*

Res judicata—Act X of 1877 (Civil Procedure Code), s. 13—"Matter in issue"—"Subject-matter" of suit—Bond—Interest.

The obligee of a bond payable by instalments sued the obligor for four instalments, claiming with reference to the terms of such bond interest on such instalments from the date of such bond. The obligor contended in that suit that, on the proper construction of the bond, the interest on such instalments should be calculated from the dates of default. The obligee obtained a decree for interest as claimed. The obligee subsequently again sued the obligor for four instalments, again claiming interst on such instalments from the date of such bond. The obligee contended again in the second suit that interest should only be calculated from the dates of default. *Held* that the question as to the date from which interest due on the defaulting instalments was exigible under the terms of such bond was *res judicata*.

It is the "matter in issue," not the "subject-matter" of the suit, that forms the essential test of *res judicata* in s. 13 of Act X of 1877.

THE plaintiff in this suit claimed Rs. 800, the amount of four instalments due on a bond dated the 12th October, 1865, and interest on such instalments from the date of such bond at the rate of eight annas per cent. per mensem. This bond was for Rs. 3,600 payable in eighteen annual instalments of Rs. 200. It contained the following condition: "On failure to pay an instalment interest at the rate of eight annas per cent. per mensem will be paid." The plaintiff relied on this condition in support of his claim for interest from the date of the bond at the rate of eight annas per cent. per mensem on the amount of the instalments claimed by him. It appeared that the plaintiff had sued on the bond in 1876 for the amount of four instalments, and had then claimed interest on such instalments from the date of the bond at eight annas per cent. per mensem, relying on the condition in the bond set forth above. The defendants contended in that suit that it was intended by that condition that in case of default interest should be computed, not

* Second Appeal, No. 65 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 16th September, 1880, affirming a decree of Babu Aubinash Chandar Banarji, Subordinate Judge of Farukhabad, dated the 30th July, 1880.

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from the date of the bond, but from the date of default. The plaintiff obtained a decree in that suit for interest from the date of the bond. In the present suit the defendants again raised the defence that it was intended by the condition in the bond that interest should be computed from the date of default, not from the date of the bond, and the plaintiff was therefore not entitled to interest from the latter date. On behalf of the plaintiff it was contended that under s. 13 of Act X of 1877 the question as to the date from which interest should be computed was *res judicata*, and could not be raised and determined in the present suit. Both the lower Courts held that such question was not *res judicata*, and holding that on the proper construction of the condition the plaintiff was not entitled to interest from the date of the bond, but only from the date of default, disallowed the plaintiff's claim for interest computed from the date of the bond. On second appeal the plaintiff again contended that under s. 13 of Act X of 1877 the question as to the date from which interest should be computed was *res judicata*.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The main contention in this appeal is that the defendants-respondents, in the former suit brought against them by the plaintiff-appellant, might have pleaded that interest should be calculated from the date of defaulting instalments on such instalments, not from the date of the bond, and not having taken this plea, but interest from the date of the bond having been decreed against them, they are debarred now under s. 13 of the Civil Procedure Code from raising this issue. The lower appellate Court ruled that the defendants are not thus debarred, because "the subject-matter of the present suit is not the same as that of the first suit, which was for four instalments that fell due prior to the instalments the subject of the present

suit." But this issue was explicitly raised by the defendants in their answer to the first action, when they pleaded not only that the bond was forged, but that "the account of interest is also incorrect;" whereupon the first Court framed the issue: "Whether or not the claim for interest to the amount demanded is proper." It is true that the first Court finding the bond to be bad dismissed the suit without determining the subordinate question of the interest payable under its terms, and this point was necessarily not raised by the plaintiff's appeal to the District Court. But after the appeal to this Court that issue was specifically directed to be tried by the order of remand, and in his return the Judge found in terms "that the four instalments claimed are really due to the plaintiff," and a decree for them passed accordingly. No doubt the defendants in their original grounds of appeal to the High Court raised, among others, the definite plea on this subject that "the Judge was wrong in decreeing interest from the date of the deed." But in the objections filed to the finding on remand there was no specific complaint as to the decision with regard to interest. However, as a matter of fact, the appeal was dismissed *in toto*, the decree of the lower appellate Court being affirmed on the 13th June, 1877. It is pleaded in the present appeal on behalf of the respondents that, the subject-matter of the present suit being different from that of the suit that terminated on the 13th June, 1877, the provisions of s. 13 of Act X of 1877 do not apply, and in support of this position the respondents rely on the Full Bench ruling of this Court in appeal under s. 19, Letters Patent, No. 3 of 1880, decided the 9th March, 1881 (1). But that case is clearly distinguishable from the one before us, the matters in issue, as well as the causes of action, having been, as it was justly held, plainly fresh and substantially different from each other in the two cases then before the Court. The first of those cases was a simple suit for arrears of *nankar* allowance charged on a specific estate; the other suit was based on a pleading that the *nankar* holders had become proprietors by purchase of a portion of the estate thus charged, and that therefore the liability of the other proprietors in respect of the amount of the *nankar* charge should be proportionately diminished. But in the present appeal we are constrained to find that the issue

(1) Unreported.

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as to the date from which interest due on the defaulting instalments was exigible under the terms of the bond was directly and substantially in issue in the former suit between the same parties, and was heard and finally decided, and must therefore be held to be *res judicata*. The matter was alleged by the appellant and repudiated by the respondents in their respective positions of plaintiff and defendants in the former suit on a claim in all respects similar both in subject-matter and cause of action. And the similar relief contained in the plaint was granted by the decree of that suit.

It is possible that the decision of the lower appellate Court has proceeded on an erroneous reading of s. 13, as would appear from its use of the phrase "subject-matter" of the suits now in question. The subject-matter in the sense of the thing sued for is of course different in each suit, but it is the "matter in issue" not the "subject-matter" of the suit that forms the essential test of *res judicata* in the section in question. "Matter in issue" is defined as matter from which either by itself, or in connection with other matter, the existence, non-existence, nature or extent of any right, liability, or disability asserted or denied in any suit or proceeding necessarily follows (Indian Evidence Act, s. 3). In the two suits of the parties now before us, one *common* matter in issue was the question of the liability of the obligors of the bond in regard to the amount of the interest secured thereby. That question was determined in the previous suit, and cannot be re-opened now. We must therefore modify the decree of the lower appellate Court, by allowing the appellant's claim in full, and decree this appeal with costs.

Decree modified.

Before Mr. Justice Straight and Mr. Justice Duthoit.

1881 *July 4.*

PANCHAM SINGH (DEFENDANT) *v.* ALI AHMAD (PLAINTIFF).*

Joint mortgage—Contribution.

P and *D*, in May, 1867, jointly mortgaged their respective two biswas shares of a certain village. In August, 1877, the mortgagee sued to recover the mortgage-money, by the sale of the mortgaged property, and obtained a decree. Before this decree was executed *L* obtained a decree against *D*, in execution of which his

* Second Appeal, No. 50 of 1881, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 18th September, 1880, affirming a decree of the Munsif of Etah, dated the 15th May, 1880.

two biswas share was put up for sale on the 20th June, 1878, and was purchased by *A*. Subsequently the mortgagee applied for execution of his decree, and *D's* two biswas share was attached and advertized for sale in execution thereof. In order to save such share from sale *A*, on the 29th June, 1878, satisfied the mortgagee's decree. He then sued *P*, *D's* co-mortgagor, to recover half the amount he had so paid, by the sale of *P's* two biswas. *Held* that, inasmuch as, when *A* discharged the whole amount of the mortgage-debt, he not only became entitled to a contribution of half such amount from *P*, but having acquired the rights of the mortgagee was competent to assert a lien on *P's* two biswas share, *A* was entitled to a decree as claimed.

The facts of this case are sufficiently stated in the judgment of the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgment of the High Court (STRAIGHT, J., and DUTHOIT, J.) was delivered by

STRAIGHT, J.—On the 12th May, 1867, Pancham Singh, defendant-appellant, mortgaged, jointly with one Dungar Singh, their several two biswas zamindari shares in mauza Bithal Kutubpur to Shere Singh and others for Rs. 200. On the 6th August, 1877, the mortgagee brought a suit to recover Rs. 507 principal and interest by enforcement of lien against the mortgaged shares, and on the 18th of the same month obtained a decree. Before execution had been taken out, one Lati Ram got a judgment against Dungar Singh, and having attached his two biswas share, it was brought to sale, and purchased by the plaintiff-respondent on the 20th June, 1878. Subsequently the obligees decree-holders under the bond of May, 1867, proceeded to execute their decree, and attached the two biswas share of Dungar Singh, of which the plaintiff-respondent had become the purchaser. In order to save it from sale he on the 29th June, 1878, paid Rs. 643-8-0, the total amount of the mortgage-money, with interest, then due, and he now sues to recover from Pancham Singh, the co-mortgagor of Dungar Singh, half that amount, Rs. 321-12-2½, by enforcement of lien against his two biswas share of mauza Bithal Kutubpur. Both the lower Courts decreed the claim in its entirety, and the only plea pressed

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by the defendant-appellant in appeal to this Court is that the decisions of the Munsif and the Subordinate Judge cannot be maintained, in so far as they grant the plaintiff-respondent enforcement of lien. We do not concur in this contention. It appears to us that, when the plaintiff-respondent discharged the whole amount of the mortgage-debt, he not only became entitled to a contribution of half the sum from the defendant-appellant, but having acquired the rights of the mortgagee, it was competent for him to assert a lien on the two biswas share of the defendant-appellant, for the proportion borne by it to the original pledge. In our opinion, therefore, the judgments of the lower Courts were right and we dismiss this appeal with costs.

Appeal dismissed.

1881
July 5.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SITLA DIN (JUDGMENT-DEBTOR) *v.* SHEO PRASAD AND ANOTHER (DECREE-HOLDERS)*

Execution of decree—Application for execution—"Step in aid of execution"—Act XV of 1877 (*Limitation Act*), *sch.* ii, No. 179 (4), (6).

Application for execution of a decree was made on the 22nd November, 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertized for sale on the 27th March, 1876. On the latter date the parties to such decree made a joint application in writing to the Court, wherein it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January, 1879. The lower appellate Court held, with reference to the question whether such application had been made within the time limited by law, that it had been so made, as under No. 179 (6), sch. ii of Act XV of 1877, such time began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 27th March, 1876. *Held* that No. 179 (6) had not any relevancy to the present case; but, inasmuch as the proceedings of the 27th March, 1876, might be considered as properly constituting a "step in aid of execution," within the meaning of No. 179 (4), the application of the 17th January, 1879, was within time.

SHEO Prasad and Tulshi Ram were the holders of a decree for money against Sitla Din. They applied for execution of their

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* Second Appeal, No. 15 of 1881, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd December, 1880, reversing an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th February, 1879.

decree on the 22nd November, 1875, and in pursuance of this application certain property belonging to the judgment-debtor was advertized for sale on the 27th March, 1876. On the date last mentioned a petition signed by both parties to the decree was presented by the pleader for the decree-holders to the Court executing the decree, in which it was stated that the judgment-debtor had paid Rs. 30 in cash to the decree-holders, and the latter had allowed the former four months time to pay the balance due on the decree, and in which it was prayed that such time might accordingly be granted. On the same day the Court made the following order on this application: "This application was put in to-day by Ishri Prasad, pleader for the decree-holders, and he stated that the sale fixed for to-day might be postponed, and four months time be granted to the judgment-debtor: as the pleader for the decree-holders applies for the postponement of the sale, it is ordered that an order issue to the amín, as prayed by the pleader for the decree-holders, that he may postpone to-day's sale in this case." The decree-holders made their next application for execution of the decree on the 17th January, 1879. The Court of first instance held that this application was barred by limitation, as it had not been made within three years from the date of the previous application of the 22nd November, 1875. On appeal by the decree-holders the lower appellate Court held, with reference to cl. 6 of No. 179, sch. ii. of Act XV of 1877, that limitation began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 27th March, 1876, and therefore the application of the 17th January, 1879, was made within the time limited by law.

The judgment-debtor appealed to the High Court, contending that the application of the 17th January, 1879, was barred by limitation, inasmuch as cl. 6 of No. 179, sch. ii. of Act XV of 1877, was not applicable, the date for payment from which the lower appellate Court had computed limitation not being the date for payment fixed by the decree, and inasmuch as no step in aid of execution of the decree had been taken within the three years immediately preceding that application.

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The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—We do not concur in the Judge's view that art. 179, cl. 6, of the Limitation Act XV of 1877 has any relevancy to the present case. But we think that the application of the 17th January, 1879, was in time, because we hold that the proceedings of the 27th March, 1876, may be considered as properly constituting a step in execution of decree. In adopting this view we follow and approve the decision in *Ghansham* v. *Mukha* (1). The appeal is dismissed with costs.

1881
July 11.

Before Mr. Justice Straight and Mr. Justice Duthoit.

GANGA RAM (PLAINTIFF) *v.* CHANDAN SINGH (DEFENDANT).*

Bond—Fraudulent alteration of hypothecation clause.

The obligee of a bond for the payment of money, in which a certain share of a village had been hypothecated as collateral security, having fraudulently altered such bond so as to make it appear that a larger share of such village was hypothecated, sued the obligor to recover the money due on such bond, by the sale of such larger share. The obligor admitted the execution of the bond and that a certain sum was due thereon. *Held*, on the question whether under these circumstances the obligee was entitled to relief as regards his claim for money, that he was not so entitled, inasmuch as the bond on which his suit was brought must be discarded, being a forgery, and therefore the suit as brought failed. S. A. No. 1037 of 1879 (2) decided the 11th March, 1880, distinguished.

THE plaintiff in this suit claimed Rs. 607, principal, and Rs. 23-11-0, interest, on a bond dated the 8th January, 1878, purporting to hypothecate a 5 biswas and 8 biswansis share of mauza Khajra Ghatam and certain other property. He claimed to recover such amount by sale of the hypothecated property. The defendant admitted the execution of the bond, and that he owed Rs. 352 odd under it; but alleged that he had only hypothecated in the bond a 5

* Second Appeal, No. 66 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 29th September, 1880, affirming a decree of Maulvi Ain-ud-din, Munsif of Belari, dated the 30th June, 1880.

(1) I. L. R. 3 All. 320. (2) Unreported.

biswansis 8 kachwansis share of mauza Khajra Ghatam; and the plaintiff had, after the execution of the bond, fraudulently altered 5 biswansis 8 kachwansis into 5 biswas and 8 biswansis. The Court of first instance found as a fact that the bond had been so altered, either by the plaintiff himself or with his knowledge; and on that ground dismissed the suit. On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance.

The plaintiff appealed to the High Court, contending that the alteration in the bond did not justify the dismissal of his claim altogether, and the suit, as regards the claim for money due, should have been decided on its merits.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondent.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

STRAIGHT, J.—We cannot concur in the Judge's view that the deed produced by the plaintiff-appellant was a forgery in its entirety; on the contrary, we think with the Munsif that it was the instrument originally executed on the 8th January, 1878, but that the 5 biswansis 8 kachwansis of Khajra Ghatam have been altered into 5 biswas 8 biswansis. The question then to be considered is, in what way does this circumstance affect the plaintiff's suit? Now it must not be lost sight of that the defendant-respondent admitted the execution of a bond for Rs. 607 on the 8th January, 1878 in favour of the plaintiff, and that the consideration for it was made up of an old bond-debt for Rs. 281 and Rs. 129 received in cash, the balance of Rs. 197 never, as he alleged, having been paid to him by the plaintiff-appellant. He further stated that he had made payments in kind towards satisfaction of the debt to the extent of Rs. 77-2-3, but he added, what we have already remarked we consider established, namely, that he had only mortgaged 5 biswansis 8 kachwansis of Khajra Ghatam. It will therefore be seen that he confessed a bond transaction with the plaintiff-appellant and consideration to the extent of Rs. 410 of which he alleged he had paid off Rs. 77-2-3. The point then arises, whether the plain-

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tiff-appellant, having come into Court with a claim upon a bond for enforcement of lien, the execution of which, though not as it now stands, is admitted by the defendant-respondent, who also allows that he is indebted to the plaintiff-appellant to the extent of Rs. 332-13-9, he is entitled to obtain the relief he asks, when such bond is found to have been altered in such a way as to give it an operation and effect that was not originally contemplated between the parties at the time of its execution. We certainly do not think that in the present form of his claim the plaintiff-appellant should be allowed to succeed. His suit was instituted upon an instrument which had been intentionally altered in a most important and material particular, either by himself or with his knowledge, behind the back and the cognizance of the obligor, for his own advantage and to the detriment of the defendant-respondent. In other words, he sought to enforce hypothecation against 5 biswas 8 biswansis of land, when only 5 biswansis 8 kachwansis had been pledged. When the contract upon which he based his suit is found never to have been made in the shape he set it up, it does not appear to us that, having thus been detected in a forgery, he should be allowed to revert to the contract that actually was made. It seems to us that on all grounds of equity and good conscience the bond now produced by the plaintiff should be discarded as evidence of the hypothecation of land, and this being so, the claim of the plaintiff-appellant as brought falls to the ground. In expressing this view, we wish to add that we in no way depart from the opinion expressed by Spankie and Straight, JJ., in Second Appeal No. 1037 of 1879 (1), the facts of which case are obviously distinguishable from the present, in that there the alteration was of some figures on the back of the bond showing the amount paid off, while here it is in the operative and effective part of the body of the instrument. How far, and to what amount, the plaintiff-appellant may be able to recover the money-debt due from the defendant-respondent is not a matter with which we are now called upon to deal. It is sufficient to say that the suit, being brought upon a bond which has been rejected as evidence of the hypothecation of land, in that shape fails, and this appeal must therefore be dismissed with costs.

Appeal dismissed.

(1) Unreported.

Before Mr. Justice Tyrrell and Mr. Justice Duthoit.

1881
July 11.

NIRMAN SINGH (DEFENDANT) v. PHULMAN SINGH (PLAINTIFF).*

Res judicata—Act X of 1877 (*Civil Procedure Code*), *s.* 13.

H, the proprietor of a one-third share of a certain undivided estate, made a gift of such share t *P*. He subsequently in February, 1875, gave a mortgage of such share, in his capacity as *P's* guardian, to *N* and *S* the two other co-sharers of such estate. In March, 1878, *P*, having attained his age of majority, brought a suit, as a co-sharer of such estate, under such gift, against *N* and *S* for possession of certain land appertaining to such estate, on the ground that they were using such land as if they were the sole proprietors thereof. The lower appellate Court, observing that such land was the property of the three co-sharers, that the mortgage of *P's* rights to *N* and *S* did not affect those rights as such, and that *N* and *S* were not justified in using such land as if they were the exclusive proprietors thereof, gave *P* a decree for possession of one-third share of such land. *N* and *S* appealed to the High Court on the ground that *P* should not have been awarded possession, as they were in possession of such land as mortgagees. The High Court remanded the case for the determination of the issue thus raised by *N* and *S*; and the lower appellate Court found that *N* and *S* were in possession of *P's* share of such estate as mortgagees under the mortgage made by *H* above referred to, and of such land as such. *P* did not take any objection to this finding; and it was adopted by the High Court and embodied in its final decree. In October, 1879, *P* sued *N* for possession of his share in such estate, claiming under the gift from *H*, and alleging that the mortgage of such share by *H* to *N* was invalid. *Held* that, inasmuch as such mortgage was matter substantially in issue in the former suit, the matter in issue in the second suit was *res judicata* under Explanations I and II, s. 13 of Act X of 1877.

ON the 25th February, 1875, one Hukm Singh mortgaged, by way of conditional sale, his shares of certain undivided villages to one Ramdin. Nirman Singh, defendant in the present suit, a co-sharer of such villages, thereupon sued Ramdin to enforce his right of pre-emption in respect of such sale and obtained a decree for such shares. In March, 1878, Phulman Singh, the plaintiff in the present suit, sued Nirman Singh and one Sital Singh, co-sharers in such villages, for possession of a certain plot of waste land appertaining to one of such villages, on which there was a ruined house, for compensation for the removal of a wall thereon, and to have the wall constructed thereon by them removed. The Court of first instance dismissed this suit for reasons which it is not material to state. On appeal by Phulman Singh the District

* Second Appeal, No. 1273 of 1880, from a decree of W. Kaye, Esq., Judge of Gorakhpur, dated the 10th September, 1880, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 28th January, 1880.

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Court found that Hukm Singh, Nirman Singh, and Sital Singh were co-sharers in the villages in question; that Hukm Singh had made a gift of his shares to Phulman Singh, and then mortgaged them to Nirman Singh and Sital Singh in his character as Phulman Singh's guardian. The Court then observed in its decision, which was dated the 23rd July, 1878, as follows:—"It is not shown that the mortgage carries with it any right to build on the land: defendants are acting in respect of this bit of waste land as if it were their exclusive property, whereas it is clear from the admissions of Sital Singh that he and Hukm Singh were two co-sharers out of (apparently) three in the mahál: this piece of waste land, not being appropriated for the purposes of a habitation (for which object it had long been disused) must be considered as the property of all three co-sharers, and the mortgage rights which the defendants, two of the three, have obtained over the proprietary rights of the third (plaintiff) do not affect those rights as proprietary rights; the defendants therefore in building a wall on the land without regard to plaintiff's wishes or consent are committing an act which could only be justified by their being exclusive proprietors, and are thereby virtually dipossessing plaintiff from his proprietary right of one-third in the land over which they hold a mortgage: this act of defendants is a good ground of action and plaintiff seeks relief by claiming possession." In the event the District Court gave Phulman Singh a decree for possession of one-third of the land in dispute, and directing the defendants to discontinue the building they had begun until Phulman Singh gave his consent to its continuance. Nirman Singh and Sital Singh appealed to the High Court from that decree on the ground, amongst others, that the land in dispute being in their possession as mortgagees, the District Court should not have awarded Phulman Singh possession. The High Court, being of opinion that it must be distinctly determined whether or not Nirman Singh and Sital Singh were in possession of Phulman Singh's share as mortgagees, before the appeal could be satisfactorily disposed of, remanded the case to the District Court for that purpose. The District Court found that Nirman Singh and Sital Singh were in possession of Phulman Singh's share as mortgagees, and of the land in suit as such. On the

return of this finding, to which Phulman Singh did not take any objection, the High Court made the following order, dated the 5th August, 1879:—"The finding has been returned on the issue remitted by this Court, and the result is that the plaintiff's claim to have the wall demolished and a one-third share in the land as proprietor to that extent declared in his favour are decreed: the Judge appears to have awarded possession, though his judgment is not altogether clear on the point: but plaintiff is not entitled to more than the finding of the lower appellate Court on the issue remitted would give him, and that is merely such possession as the circumstances of the case admit of without prejudice to the possession of the mortgagées, the defendants; and to prevent any misunderstanding the appeal is partially decreed, and the lower appellate Court's judgment modified accordingly." In October, 1879, Phulman Singh instituted the present suit against Nirman Singh, in which he claimed possession of the shares in question by virtue of the gift to him by Hukm Singh, alleging that the mortgage in February, 1875, to Ramdin by Hukm Singh his guardian was invalid, such mortgage having been made without legal necessity and without benefit to him. The defendant set up as a defence to the suit that such mortgage had been made "by lawful authority and under legal necessity and for the benefit" of the plaintiff. The Court of first instance decided that such mortgage was invalid, having been made without authority and without legal necessity, and gave the plaintiff a decree for possession of the shares. On appeal by the defendant the lower appellate Court affirmed this decision, holding further that the question whether such mortgage was valid or invalid was not a matter substantially at issue in the former suit betwen the plaintiff and the defendant, although its validity might have been attacked in that suit, and that therefore such question was not under s. 13 of Act X of 1877 *res judicata*. On second appeal to the High Court it was contended on behalf of the defendant that, inasmuch as in the former suit between the parties, the plaintiff had not impugned the validity of the mortgage, and the defendant's possession thereunder had been established, the present suit to set aside the mortgage was not maintainable.

Mr. *Amir-ud-din* and Lala *Lalta Prasad*, for the appellant.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the respondent.

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NIRMAN SINGH v. PHULMAN SINGH.

The judgment of the Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

TYRRELL, J.—We have referred to the various proceedings in the former litigation between the parties to this appeal, and we find that the plea of *res judicata* raised here among other pleas by the defendant-appellant is valid and must be allowed. In March, 1878, Phulman Singh, having recently attained his majority, brought an action on the basis of his deed of gift of the property of Hukm Singh against Nirman Singh, alleging trespass on a piece of land once the property of the said Hukm Singh, and part of the estate given by him to Phulman Singh. In that case the District Appellate Court found that "Hukm Singh made a gift of his share in the property to the plaintiff and then mortgaged plaintiff's share to the defendant in his character of guardian of the plaintiff: it is not shown that the mortgage carries with it any right to make buildings on the land &c. &c." This finding was found in second appeal to be deficient in precision, and the case was remanded by this Court on the 6th May, 1879, for an explicit finding on evidence "whether the defendant was in possession of the plaintiff's share as mortgagee." The return to this remand certified that the "vakils for the plaintiff allow that the defendant is in possession of the share by virtue of the mortgage" (now in question): and that the subject-matter in dispute (then) was some land on which was a ruined house, *which land is in possession* of defendant as (plaintiff's) mortgagee." This finding was adopted by this Court, and became embodied in its final decree of the 5th August, 1879, in that case. Thus it is clear that the mortgage executed in February, 1875, by Hukm Singh, in his personal character and as representing his ward and donee Phulman Singh, in favour of the representative of the present defendant-appellant was matter substantially in issue in the suit mentioned above between the same parties: and the matter in issue in the present suit is therefore *res judicata* in the fullest sense and extent of s. 13 of the Civil Procedure Code, and of the first and second Explanations thereof. This finding precludes the necessity for considering the other pleas in appeal. The decrees of the Courts below are set aside and the appeal is decreed with costs.

Appeal allowed.

FULL BENCH.

1881
July 11.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Duthoit.

MUHAMMAD ISMAIL (PLAINTIFF) *v.* CHATTAR SINGH AND ANOTHER (DEFENDANTS) *

Res judicata—Act X of 1877 (*Civil Procedure Code*), *ss.* 13, 542—*Plea taken for the first time in second appeal.*

Held that not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542 of Act X of 1877, but that even when such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands, or after a remand for findings of fact.

AT the hearing of this second appeal an objection was taken for the first time on behalf of the appellant (plaintiff) that the matter in issue between the parties was *res judicata*. On behalf of the respondents it was contended that it was too late to take such objection, and the judgment of the Court (Straight, J., and Tyrrell, J.) in Second Appeal No. 1143 of 1880 (1) was cited in support of this contention. The Division Court hearing this appeal (Stuart, C. J., and Duthoit, J.), having regard to the judgment cited, referred the question raised by the respondent's contention to the Full Bench. The order of reference was as follows :—

ORDER of REFERENCE.—The plea of *res judicata* is raised before us in this second appeal for the first time; and we observe that another Division Bench of the Court (Straight and Tyrrell, JJ.) have held that such a plea, when not taken in the lower appellate Court, may not be heard in this Court in second appeal. But as we doubt the soundness of that ruling, we refer the question to the Full Bench of the Court. Ss. 542, 582 and 587 of the Code of Procedure all appear to bear on the question. Indeed, s. 542 read in connection with the other sections, appears to us to imply that such a plea as that of *res judicata*, being in our opinion a "ground of objection" within the meaning of that section, may, with leave

* Second Appeal, No 1311 of 1880, from a decree of G. L Lang, Esq., Judge of Aligarh, dated the 26th August, 1880, reversing a decree, of Sayyid Zahur Husain, Munsif of Koel, dated the 27th April, 1880.

(1) Decided the 16th May, 1881, not reported.

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of the Court, be taken in second appeal; and we are inclined to think that such leave may be given either expressly or by the plea being tacitly allowed to be stated and argued.

Mr. *Siraj-ud-din* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath* and Lala *Harkishen Das*, for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—I am very glad to find that Mr. Justice Duthoit and I mistook the ruling of our colleagues, Straight, J., and Tyrrell, J., to which we adverted in our referring order. As that ruling appeared to us to be expressed we were afraid that our colleagues had recorded the opinion which we attributed to them, but in which we felt great difficulty in concurring. My opinion distinctly was and is that the plea of *res judicata* can certainly be taken in second appeal, either by the pleas in appeal, or orally before us, and for the first time, and at any stage, or after remand. Such is the necessary effect of the provisions of the Code mentioned in the order of reference, *viz.*, ss. 542,582, and 587. But at the same time I must repeat the opinion, which I have so often expressed from the Bench in other cases, that this plea of *res judicata* is utterly unsuited to the great mass of litigation of this country; and that in shutting the mouth of a plaintiff or defendant because in a former suit between the same parties, or parties in the same right, the matter of the plea might therein have been urged and adjudicated upon, but was inadvertently omitted from consideration by, it may be, a poor litigant in ignorance of his rights, or by his local pleader not less ignorant of his law, or by a Court not very intelligent as to either, the policy of the law is mistaken, and I am convinced often leads to gross injustice. But having regard to the law as it stands, and particularly to the provisions of s. 13, Act X of 1877, the plea may be taken, and in all suits and in all appeals. To the remark, however, that this plea not only goes to the root of the case, but "to the jurisdiction of the Court," I must demur. It no doubt destroys the coercive authority of the Court in the particular case in which it is raised and allowed, but in no other sense does it go to the jurisdiction of the Court itself,

and the very fact that it is submitted actually to the judgment of the Court in which it is raised is sufficient to show that, so far as the merits of the case are concerned, the Court has, and would have had, jurisdiction, but for the plea.

STRAIGHT, J. (TYRRELL, J. concurring):—This reference to the Full Bench would seem to have been made by the learned Chief Justice and Duthoit, J., under a misconception of the meaning of a passage in a judgment delivered by us in Second Appeal No. 1143 of 1880 (1). We think it right to take this opportunity of saying we had no intention whatever of ruling that the objection of *res judicata* cannot be raised for the first time in special appeal, nor do our remarks, when examined with the context, appear to bear any such construction.

In reply to the reference we would say that in our opinion not only may the point of *res judicata*, though not taken in the memorandum of appeal, be entertained by this Court in second appeal under the provisions of s. 542 of the Civil Procedure Code, but that even when it has not been urged in either of the lower Courts, or in the pleas in appeal, if raised in this Court, it must be considered and determined, either upon the record as it stands or after a remand for findings of fact. For the objection is one which seems to us to go to the very root of the case, and to the jurisdiction of the Court, and if established is an absolute bar to the suit. The words of s. 13, which by the way figures in the Chapter relating to jurisdiction, are imperative: "No Court shall try any suit or issue;" and a prior final judgment *inter partes* of a Court of competent jurisdiction upon a matter or matters, directly and substantially in issue between them, is a positive bar to a subsequent suit between the same parties in respect of such matter or matters. It is obvious that the practice is inconvenient to allow new objections to be raised in special appeal for the first time. But it is difficult to see how this Court can properly avoid taking notice of objections which assail the plaintiff's right to come into Court at all, or the competency of the defendant to raise matters by way of defence which have been already litigated and determined between the parties. We think, therefore, that it was competent

(1) Decided the 16th May, 1881, not reported.

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for the Division Bench which made this reference to permit the appellant before them to raise the objection of *res judicata*, though taken for the first time, of course always subject to sufficient opportunity being afforded the respondent of meeting such plea.

DUTHOIT, J.—I concur entirely (upon the grounds stated by my honorable colleagues, Straight and Tyrrell, JJ.,) in the opinion that a plea of *res judicata*, though not taken in the memorandum of appeal, may be entertained by this Court in second appeal, and that even when it has not been urged in either of the lower Courts, it must be heard and determined in this Court, either upon the record as it stands, or after a remand for findings of fact.

1881 *July* 13.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell

THE COLLECTOR OF SHÁHJAHÁNPUR MANAGER OF THE ESTATE OF RAJA JAGAN NATH SINGH (DECREE-HOLDER) *v.* SURJAN SINGH AND ANOTHER (JUDGMENT-DEBTORS)*

Execution of decree—Application by one of two joint decree-holders for part execution of joint decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179—*Act X of* 1877 (*Civil Procedure Code*), *s.* 231.

A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder.

Held, therefore, where one of two persons in whose favour a decree for money had been passed jointly applied on the 27th April, 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April, 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force.

Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole preferred after the period of limitation had expired.

ON the 14th April, 1873, Sewa Ram and Bhajan Lal obtained against Chattar Singh and Surjan Singh a joint decree for Rs. 1,717-7-6. Execution of this decree was taken out in 1877,

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* Second Appeal, No 16 of 1881, from an order of W Duthoit, Esq, Judge of Sháhjahánpur, dated the 13th November, 1880, reversing an order of Maulvi Zaif-ul-Abdin, Subordinate Judge of Sháhjahánpur, dated the 31st July, 1880.

and, with reference to the terms of No. 179, sch. ii of Act XV. of 1877, the 3rd May, 1877, was the date from which limitation began to run. On the 27th April, 1880, the Collector of Shâhjahânpur, who represented Sewa Ram, applied for execution of a moiety of the decree; and on the 30th April, 1880, Bhajan Lal applied for execution of the other moiety. These applications were granted, and certain property belonging to the judgment-debtors was attached and advertised for sale on the 21st August, 1880. On the 14th July, 1880, the judgment-debtors objected to execution of the decree on the ground that portions of a joint decree were not capable of execution. On the 30th July, 1880, before this objection was disposed of, the Collector of Shâhjahânpur presented a petition praying that his application of the 27th April, 1880, might be amended, and the sale be held in execution of the whole decree. The Court of first instance, by an order dated the 31st July, rejected the objection of the judgment-debtors, and granted the application of the decree-holder, and ordered that the property should be sold in execution of the whole decree. On appeal by the judgment-debtors the lower appellate Court held that execution of the decree was barred by limitation, inasmuch as the application of the 27th April, 1880, could not be treated as keeping the decree alive in the terms of No. 179, sch. ii, Act XV. of 1877, not being an application in accordance with law, and as when the amended application of the 30th July, 1880, was made limitation had expired.

The decree-holder appealed to the High Court, contending that the application of the 27th April, 1880, was one which kept the decree in force.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondents.

The judgment of the Court (STRAIGHT, J, and TYRRELL, J.) was delivered by

STRAIGHT, J.—We cannot disturb the order of the Judge reversing the decision of the Subordinate Judge and disallowing the appellants' execution of the decree of the 14th April, 1873. The grounds upon which it proceeds are unassailable in point of law, and the

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plain terms of s. 231 of the Civil Procedure Code and cl. (4), art. 179, sch. ii of the Limitation Act of 1877, leave us no alternative but to uphold his judgment. Neither the application of the Collector of the 27th April, 1880, nor that of Bhajan of the 30th of the same month, was an application made in accordance with law; because the decree which they sought to execute, having been passed jointly in favour of more persons than one, could only be executed by one or more of such persons as a whole for the benefit of all, and not partially to the extent of the interest of each individual decree-holder. These proceedings, therefore, in their inception being wholly irregular and ineffectual, could not be cured by any subsequent amendment such as that applied for to the Subordinate Judge on the 30th July. We may add that the view expressed by the Judge, of which we approve, is recognised and acted upon in the case of *Ram Autar* v. *Ajudhia Singh* (1) The appeal must accordingly be dismissed with costs.

Appeal dismissed.

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July 14,

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

BHAGGU LAL (PLAINTIFF) v. DEGRUYTHER (DEFENDANT).*

Partnership—Loan of money—Act IX. of 1872 (*Contract Act*), *ss.* 239, 240.

Held, on the construction of the agreement in this case, that such agreement did not create a "partnership" between the parties thereto, as defined in s. 239 of Act IX. of 1872, but was an agreement of the kind mentioned in s. 240 of that Act.

THE plaintiff in this suit stated that it had been agreed by and between him and the defendant, that he should advance to the defendant the money required by him to carry out a contract entered into by him with Government for the supply of metal for certain portions of the 5th and 6th miles of a road called the Chilla road; that he (plaintiff) should receive one half of the profits made by the defendant on such contract; that he should advance the money required by the defendant to carry out any other contracts into which he might enter, and should receive one half of the profits

* Second Appeal, No 1288 of 1880, from a decree of G. F. Knox, Esq., Judge of Bánda, dated the 23rd September, 1880, modifying a decree of Kazi Wajeh-ul-fah Khan, Subordinate Judge of Bánda, dated the 3rd July, 1880.

made by the defendant on such contracts; that the defendant had promised to pay him interest on sums so advanced at the rate of one per cent. per mensem; that the defendant had entered into other contracts with Government, *viz.*, for the supply of metal for the 8th mile of the Chilla road, for the 42nd and 43rd miles of a road called the Manikpur road, for the 57th mile of the said Manikpur road, and for the construction of a bridge called the Kahli bridge, and into a contract with the Municipality of Bánda for the construction of a latrine; that the money required by the defendant to carry out such contracts had been advanced to him by the plaintiff; and that the defendant had made profits on all such contracts. The plaintiff accordingly claimed to recover the money he had advanced to the defendant with interest at one per cent. per mensem, and a moiety of the profits made by the defendant on such contracts. He also claimed to recover money which he had advanced to the defendant on his private account. He based the suit upon an instrument executed by the parties, bearing date the 10th February, 1879, the terms of which were as follows:—

"I Mr. DeGruyther, contractor between miles 5 and 6 on the Chilla road, pargana Sillahbi, son of William DeGruyther, an Englishman, resident of Bánda: whereas I have taken a contract from the Engineer of the Chilla Road for the collection and supply of stone ballast as following, *viz.*, 7920 feet at the 5th mile-stone and 15,840 feet at the 6th mile-stone on the Chilla road leading to Fatehpur, aggregating a total quantity of 23,760 feet to be supplied at both mile-stones by the 26th March, 1879, this is to witness that of my own free will and accord I take as a partner to the extent of one half share Bhaggu Lal, son of Lallu, caste Unar Bania, resident of Bánda, on the following conditions:—(i) That whatever monies may be needed to start the business shall be provided by Bhaggu Lal: (ii) that whatever orders for *bajri* (gravel) I may get from the Engineer I shall make Bhaggu Lal a partner also in the said business, he supplying the capital necessary for the collection and delivery of the said *bajri*; (iii) that whenever I get payment for supplies of material from the Engineer by cheque, I shall after getting the same signed by him hand the said cheque to Bhaggu Lal for realization from the Treasury; (iv) that whenever the whole work shall have

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been finished it shall be competent to Bhaggu Lal to deduct Re. 1 per cent. interest on all the money he may have laid out and all necessary expenses for carrying on the work, and out of the net profits remaining I shall be entitled to share in the same to the extent of one moiety and Bhaggu Lal to the extent of the other: (v) that a *gomashta* on Rs. 10 a month and a *mistri* on Rs. 10 a month shall be employed in the business of the partnership, and their wages shall be charged to the partnership account: (vi) that the said *gomashta* and *mistri* shall on the evening or morning of each day render an account of monies expended in the said business, and whatever monies may be spent shall be expended through Bhaggu Lal, and whatever sums seem requisite to carry on the business shall be laid out in consultation between the two partners, and neither shall be at liberty to incur such outlay without the consent of the other: (vii) that when the whole of the work shall have been completed and the Engineer shall have passed the same, should I make default in payment of the interest stipulated to be paid to Bhaggu Lal, or in case I fail to pay the half share of profits agreed on, then in such case it shall be competent to Bhaggu Lal to realize the said interest and profits of his half share; (viii) that this condition hath also been agreed upon between the aforesaid parties that any work which may hereafter be obtained by either of us, commencing from the 1st April, 1879, both I and Bhaggu Lal bind ourselves to let the other share therein to the extent of one-half, and neither I nor my heirs shall object to any of the above conditions. In witness whereof we have this day signed the aforesaid partnership agreement. *N.B.* Supplementary clause.—Should Bhaggu Lal not spend the monies as stipulated herein, it will be open to me to sue him for damages arising from breach of this agreement". The plaintiff claimed altogether Rs. 2,682-5-0 according to accounts produced by him. The defendant set up as a defence to the suit which raised the issues, amongst others, as to the amount actually due to the plaintiff for money advanced and for a moiety of the profits made on his contracts by the defendant. The Court of first instance held it to be proved that a sum of Rs. 1,365-14-3 was due to the plaintiff for money advanced to the defendant for his contracts and privately, and Rs. 297-13-9 for a moiety of the profits of the

contracts; and gave the plaintiff a decree accordingly. On appeal by the defendant the lower appellate Court, treating the instrument of the 10th February, 1879, as one of partnership, held generally, as regards the claim for a moiety of the profits of the contracts, that the suit was not maintainable, inasmuch as a partnership existed between the parties, and this being the case one partner could not sue the other for profits which had accrued up to a particular date, but should sue for an account. As regards the claim for a moiety of the profits on the contract for the supply of metal for the Chilla road, the lower appellate Court held that the cause of action in respect of such claim had not arisen, as the defendant had not completed such contract. The lower appellate Court accordingly reversed the decree of the Court of first instance, in so far as it related to the claims for money advanced to the defendant for his contracts and for a moiety of the profits on the contracts. The plaintiff appealed to the High Court, contending that the instrument of the 10th February, 1879, was not an instrument of partnership, and the plaintiff was entitled to sue on its basis to recover the money advanced by him to the defendant and his share of the profits of the contracts entered into by the defendant.

Mr. *Howard*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The High Court (STUART, C. J., and TYRRELL, J.,) delivered the following judgment:—

STUART, C. J.—This case appears to have been misunderstood by both the Courts below, and also by the parties. The Subordinate Judge appears to have had some kind of vague apprehension of the nature of the plaintiff's claim, but his language is so loose and inartificial that it is difficult to understand what his meaning really is. He was no doubt labouring under the disadvantage of trying the case on issues prepared not by himself but by his predecessor. His judgment, however, is in many respects not irrelevant to the causes of action embraced in the suit, for, as we shall presently explain, there is, from the nature of the case, more than one cause of action. But the Judge appears to have altogether

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misapprehended the case, dealing with it as one of partnership, plaintiff and defendant being in his view parties in a venture of that character. In so regarding the suit the Judge was altogether mistaken. The suit is not of that nature, although the words "partner" and "partnership" occur in a somewhat careless manner in the document relied on. Nor is it very clear that the plaintiff and defendant themselves understood in the lower Courts what their relative position towards each other really and legally was. The claim made by the plaint is based primarily on an agreement between the plaintiff and defendant dated 10th February, 1879; there is also a claim in respect of an alleged advance of Rs. 96-10-0 to the defendant for his private use. It would further appear from the last of the issues laid down before the first Subordinate Judge that the case, as so far heard and considered by him, included another claim for Rs. 341-8-0 on account of certain tools supplied by the plaintiff to the defendant. These three claims might all have afforded separate causes of action, in so many separate suits, but by s. 45 of the Procedure Code they may be united in one and the same suit, and they certainly can conveniently be so entertained. There might also have been a fourth cause of action under art. 8 of the agreement of February, 1879, by which any work, *i.e.*, of course the profits of any such work, other than the immediate subject-matter of the agreement, which either of them might thereafter obtain, should be equally divided between them. The last stipulation appears to be the only circumstance in the case favouring the idea of a partnership between the parties, but there are no facts stated in connection with it, and it may be left out of consideration. Its introduction into the agreement does not in the least affect the legal character of the transaction which was the subject of the agreement of February, 1879, entered into by them, or give any colour to the view that a valid partnership had for all the purposes mentioned in that agreement, and within the meaning of the law, been made by them.

It would appear that the defendant DeGruyther had obtained a Government contract from the District Engineer of Bánda for the collection and suppy of a certain material for metalling roads called *bajri*, but that not having sufficient funds of his own for working the

contract he applied to the plaintiff, who is a *bania* or money-lender in Bánda, for advances to enable him to carry on the work. This the plaintiff agreed to on certain conditions, which were embodied in the agreement to which we have already adverted, dated the 10th February, 1879, and which agreement was in the following terms: (After setting out the terms of the agreement of the 10th February, 1879, the judgment continued): Now it is quite clear to us that this agreement does not on the face of it show a contract of partnership, but that it is merely a subsidiary arrangement on the condition stated to enable the defendant to carry out the work given to him on behalf of the Government. This contract with the Government was one in regard to which the plaintiff had no responsibility, and with which he has no concern other than that shown by his private and subsidiary agreement with the defendant, and he has no sort of connection, and held no relation, with the Engineer of Bánda, or with any other person representing the Government's interests in the metalling of the roads referred to. The sole responsibility to the Government was with the defendant, and if he chose or found it necessary to seek the help of the plaintiff, that was a circumstance entirely *inter se*, and it could not create any partnership between them.

The Judge would seem to have received some legal impressions from his reading of English law-books on the law of partnership; and, assuming that there was a contract of that nature between the parties in this case, chiefly if not mainly from the presence in it of art. 8,—which we have already pointed out does not in the least affect the character of the agreement of February, 1879,—he discusses the question of the dissolution of a partnership with the intention of demonstrating that there was no dissolution here, and that in fact the partnership was subsisting at the time the present suit was brought, and was still subsisting. But as we have already said there was no partnership, and if the Judge had only looked into the Indian Contract Act, IX of 1872, and with which he ought to have been familiar, he would have seen that there was no such contract. By s. 239 of the Indian Contract Act partnership is defined to be "the relation which subsists between persons who have agreed to combine their property, labor or skill in

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some business and to share the profits thereof between them", and a partnership so created is called collectively a "firm". Now having regard to the facts of the present case it is idle to attempt to show that the state of things upon which such a partnership depends, ever had any existence: there was no combination of property, labor or skill; for the property, such as it was, that is the Government contract, and the labor or skill were all on the side of the defendant, the plaintiff simply supplying the defendant with certain sums of money. Again, to place the matter beyond the reach of doubt, s. 240 of the Contract Act provides that:—"A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, *or that he shall receive a share of the profits*, does not, of itself, constitute the lender a partner, or render him responsible as such." This to our mind as nearly as possible describes the agreement between the plaintiff and defendant of February, 1879, and puts an end to the contention that the plaintiff was partner of the defendant, even although he is ignorantly called so in the agreement itself and loosely and vaguely referred to as such in the pleadings and in the judgments of both the lower Courts. Not as a partner then, but as a party to the agreement of 1879, the plaintiff is entitled to recover from the defendant all advances and payments made by him, as well as all other sums in name of interest or otherwise on foot of it, and also any money lent to the defendant for his private use, and any other sum or sums his right to which he can substantiate. There is also the question much dwelt upon by the Judge, in fact it is the immediate cause of his order decreeing the appeal, whether when the suit was brought the condition of the agreement of 1879 relating to the completion of the work on the roads had been finally complied with. The Judge states, on the authority of one Nadir Lal a witness, that all the money due to the defendant under his engineering contract had been paid upon a promise by him that he would finish up certain bits of work which were not properly carried out. And this is a question which ought to be carefully considered and ascertained, and its effect upon the plaintiff's claim determined.

With reference to such considerations and in order to ascertain the relative position of the parties with respect to liability and

indebtedness, an account must be taken, and the case must go back to the Judge for that purpose.

We therefore allow the present appeal, set aside the order of the Judge, and remand the case to him under s. 562, with directions to try and determine the issue what sum of money, if any, remains due by the defendant to the plaintiff on foot of the agreement of the 10th February, 1879, and otherwise; and for such purpose to have an accurate and detailed account of all pecuniary transactions between the parties taken before himself, a balance struck, and the merits of the case decided by him accordingly. The appellant is entitled to the costs of this appeal.

Cause remanded.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr Justice Duthoit.

1881 *July* 18.

DURGA BIBI AND ANOTHER (DEFENDANT) *v.* CHANCHAL RAM (PLAINTIFF).*

Religious endowment—Right to officiate in Temple—Alienation—Execution of decree.

The right of managing a temple, which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, cannot, in default of proof to the contrary, pass outside the family of the trustee, until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree. The principle laid down by the Privy Council in *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1) followed.

THIS was a suit for a declaration that certain property was liable to attachment and sale in execution of a decree held by the plaintiff, as the property of one Saktidat, deceased. One Sital Misr, son of Sadhu Misr, priest of the temple of Sankata Debi at Benares, died leaving two sons, Sukhdeo and Saktidat, and two daughters, Durga Bibi and Sohni Bibi, defendants in this suit. Saktidat died leaving no issue, but a widow named Sobhni Kuar. On the 1st May, 1878, the plaintiff in this suit, Chanchal Ram, obtained a decree in the Court of the Subordinate Judge of Benares against Sobhni Bibi as the legal representative of her deceased husband, Saktidat, for Rs. 3,500. Chanchal Ram subsequently assigned a moiety of this decree to a person represented by one Ganga Ram. In execution of this decree the decree-holders caused a moiety of a certain buil-

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* First Appeal, No. 10 of 1881, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 18th September, 1880.

(1) L. R., 4 Ind App. 76.

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ding at Benares and of the moveable property contained therein, and of the right to preside at the worship of, and to take the offerings made to the idol of Sankata Debi, to be attached and proclaimed for sale, alleging that such property formed the estate of Saktidat, and had descended to his widow, their judgment-debtor. Durga Bibi and Sohni Bibi, the daughters of Sital Misr, objected to the attachment and sale of such property, on the ground that it formed part of a religious endowment, which, by the death of Saktidat and a surrender of his rights in their favour by Sukhdeo, had passed to them as heirs to their father. On the 17th March, 1879, the Subordinate Judge made an order allowing this objection and releasing the property from attachment. Thereupon Chanchal Ram instituted the present suit against Durga Bibi and Sohni Bibi for the cancelment of that order and to have such property declared liable to be sold in execution of his decree. The defendants set up as a defence to the suit that the building in question constituted the temple of Sankata Debi and was endowed property, and no portion of it formed the private property of Saktidat; that a portion of the moveable property in question was also the property of the temple, and the remainder of such property had belonged exclusively to Sukhdeo, who had made a gift of it to them before it had been attached in execution of the plaintiff's decree; and that the income derived from the offerings made to the idol of Sankata Debi was also the property of the temple, and no portion of such income was the private property of Saktidat. The Subordinate Judge held that the building in question did not constitute the temple of Sankata Debi, but was the private property of Sital Misr, and one moiety thereof had devolved by inheritance on Saktidat, and was liable for his debts; that Saktidat had no interest in the moveable property in question; and that the right of presiding at the worship of Sankata Debi and of taking the offerings made to the idol was the private property of Sital Misr, and Saktidat had succeeded to one moiety of such right, and such moiety was liable for his debts. The Subordinate Judge accordingly gave the plaintiff a decree declaring that a moiety of the building in question, and of the right to officiate at the worship of Sankata Debi and to take the offerings made to the idol, was liable to be sold in execution of the plaintiff's decree as the property of

Saktidat, deceased. The defendants appealed to the High Court. On their behalf it was contended that the building in dispute formed the temple of Sankata Debi and was endowed property, and was therefore not liable to be sold for the private debts of Saktidat; and that the right to officiate at the worship of an idol and to take the offerings made to it was a right which was not saleable in execution of decree.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

The judgment of the Court (STUART, C. J., and DUTHOIT, J.), so far as it is material for the purposes of this report, was as follows:—

DUTHOIT, J. (after holding, on the evidence, that the building in question was a religious endowment, and that it was not saleable in execution of the plaintiff's decree, continued:)—We are also of opinion, in default of any proof to the contrary, that the right of managing the temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, legally cannot pass outside the family of the trustee Sádhu Misr, until absolute failure of succession in his family. The principle that rights of the kind under reference are by the Common Law of India inalienable has been affirmed by their Lordships of the Privy Council in *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1). With reference to the above remarks, we decree the appeal and dismiss the respondent's objection with costs.

Before Mr. Justice Straight and Mr. Justice Duthoit.

1881 *July* 19.

UGRAH NATH (JUDGMENT-DEBTOR) v. LAGANMANI (DECREE-HOLDER).*

Execution of decree—Application for execution—Decree directing payment to be made at a certain date—Act XV of 1877 (*Limitation Act*), *sch.* ii, *Nos.* 75, 179 (6).

L obtained a decree against *U*, dated the 24th September, 1867, for possession of a certain estate subject to this provision, *viz.*, that if *U* paid in cash into the treasury

* Second Appeal, No. 1 of 1881, from an order of W. Kaye, Esq., Judge of Gorakhpur, dated the 25th September, 1880, affirming an order of Sayyid Nazar Ali, Munsif of Bansi, dated the 7th August, 1880.

(1) L. R., 4 Ind. App. 76.

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of the Court, year by year, for *L's* maintenance, so long as she might live, an allowance of Rs. 15 per mensem, in three instalments of Rs. 60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, *L* should be entitled to delivery of possession of such estate. The first default was made on the 18th January, 1874, but *L* waived the benefit of the provision. A fresh default was made, and on the 23rd January, 1880, *L* applied for possession of such estate. *Held* that the provisions of column 3, art. 75, sch. ii of Act XV. of 1877, were not applicable to this case, but art. 179 (6) of that schedule contained the law which must govern it; and, the date upon which such decree became capable of execution for possession being the 18th January 1874, the date of the first complete default, the application of the 23rd January, 1880, was barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

DUTHOIT, J.—This is an appeal from an order of the Judge of Gorakhpur, affirming an order of the Munsif of Bansi, directing delivery of possession to Laganmani of certain landed estate in execution of a decree of the Principal Sadr Amin of Basti, dated the 24th September, 1867. Laganmani had, on the 18th June, 1867, sued for possession of the property in question by right of succession to her deceased husband, Jadu Nath Tiwari. On the 24th September, 1867, she obtained the decree of which execution has now been ordered. The portion of it with which we are concerned runs thus: "A decree for possession of the shares claimed is passed in favour of the plaintiff, subject to the condition that, if the defendant pay in cash into the treasury of the Court, year by year, for the plaintiff's maintenance so long as she may live, an allowance of Rs. 15 per mensem, in three instalments of Rs 60 each, the decree for possession shall not be executed: if the defendant default in three instalments, the plaintiff will be entitled to delivery of possession of the shares in execution of that decree." The applicant alleged that her allowance had never been paid with regularity, and asked that, as default had been made in more than one year's payments, possession might be delivered to her. The judgment-debtor alleged that other payments than those shown

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in the Court books had been privately made to the applicant, and declared his willingness to satisfy arrears, and prayed that the request for entry on the property might be disallowed. The Court of first instance ruled that no allegation of out-of-Court payments could be listened to; and holding that the judgment-debtor was a confirmed defaulter, directed delivery of possession to the applicant of her share in the estate. In appeal to the Judge limitation was relied on, and it was pleaded that, as the last application for execution was presented more than eleven years ago, the present application was beyond time. The Judge, however, held that such part-payments on account of the allowance created a fresh limitation period, and that the present application was within time, and affirmed the Munsif's order.

It is contended in second appeal that the Judge is mistaken, and that the claim is really barred by limitation. Our sympathies are necessarily with the respondent, but we are of opinion that the appeal must prevail. The provisions of column 3, art. 75, sch. ii, Act XV of 1877, are not applicable to the circumstances of this case; for the claim is not on a promissory note or a bond, and it is an application, not a suit. Art. 179 contains the law which must govern it. And it appears from the registers of the Court of the Munsif of Bansi that the date upon which complete default first occurred (*i.e.*, as regards three over-due instalments) was the 18th January, 1874. That, therefore, was the date upon which the decree became capable of execution for possession. The original application for execution made prior to the one now in question bears date the 9th January, 1868. Clearly, therefore, the respondent's application of the 23rd January, 1880, was statutorily barred, and should have been rejected. The appeal is decreed with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Duthoit.

1881 *July* 27.

ALLU KHAN (DEFENDANT) *v.* ROSHAN KHAN (PLAINTIFF).*

Mortgage—Redemption—Tacking.

The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money in each of which it was stipulated that, if the amount were

* Second Appeal, No. 1334 of 1881, from a decree of G. F. Knox, Esq., Judge of Bánda, dated the 1st October, 1880, modifying a decree of Kazi Wajeh-ul-la Khan, Subordinate Judge of Bánda, dated the 14th August, 1880.

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not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage-money. *Held* that, although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage-money.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Duthoit, J.

Babu *Oprokash Chandar Mukarji* and Munshi *Ram Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for the respondent.

The Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgments:—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Bánda, modifying a decree of the Subordinate Judge of that district. Omitting matter which is now irrelevant, the facts connected with it may be thus stated:—Bakar Khan had four sons, Pahar Khan, Dilawar Khan, Pahlu Khan, and Maharban Khan. On the 23rd December, 1878, Roshan Khan acquired by private purchase the rights and interests of Pahar Khan, Dilawar Khan, and Pahlu Khan in certain landed estate which had belonged to Bakar Khan. This estate had on various dates been usufructuarily mortgaged by Bakar Khan, by Bakar Khan and his brothers, and by Bakar Khan's sons (vendors to Roshan Khan) to Allu Khan, member of the same family, for sums which amounted in all to Rs. 517; Roshan Khan admitted that a further sum of Rs. 45, borrowed (on a simple bond) by his vendors from the mortgagee, was due from him, which made the total amount due Rs. 562; and, by plaint dated the 31st May, 1880, sued for redemption of the entire estate, on the allegation that although he had, on the 23rd May, 1879, tendered Rs. 562 to the mortgagee, redemption had been refused to him. Allu Khan defended the suit on the ground that no

tender of Rs. 562 had been made to him as stated by the plaintiff, and that, besides the amount of the original mortgage loan, other sums were due to him on bonds as per subjoined detail :—

Serial letter.	Obligor.	Date of bond.	Consideration expressed in it.	Rate of interest in bond.	Due date	Amount of bond with interest at time of suit.
			Rs.			Rs. a. p.
A.	Bakar Khan himself.	15th September, 1865.	49	24 per cent per annum	Baisakh, Sambat 1926, or about April, 1866.	241 14 0
B.	Maharban Khan a son of Bakar Khan.	7th October, 1868.	15	Ditto ..	Baisakh, Sambat 1926, or about April, 1869	56 4 0
C.	Pahar Khan, Dilawar Khan, Pahlu Khan, sons of Bakar Khan, (the vendors to Roshan Khan)	26th June, 1869	45	Ditto .	Aghan Badi 15th, Sambat 1926, or the 3rd December, 1869.	118 8 4
D	Pahar Khan, Pahlu Khan and Dilawar Khan.	16th July, 1876.	24	Ditto ..	Aghan, Sambat 1933, or about November, 1876.	46 4 4

Each of these bonds was conditioned to the effect that, if the amount of the loan with interest should not be repaid on due date, it should take priority of the mortgage loan, and redemption of the mortgage on the property should not be claimed until it had been satisfied The Court of first instance found that none of the supplemental bonds constituted a charge upon the estate, and that, this being so, all which the mortgagee was entitled to receive before the redemption was Rs. 562 ; but it held that as this amount had not been paid into Court, redemption could not be decreed, and on this ground it dismissed the plaintiff's suit. With this decision both parties were dissatisfied. The plaintiff asserted in appeal to the Judge that he had proved tender, on the 23rd May, 1879, of Rs. 562 to the mortgagee, and prayed a decree for redemption. Allu Khan objected to that part of the Subordinate Judge's decision which declared the plaintiff entitled to redemption on payment of Rs. 562 only. The Judge held that tender of the

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Rs. 562 had been sufficiently established; but (mistaking in this respect the tenor of the lower Court's decision) held that the Subordinate Judge had erred in finding that "moneys due under four other bonds must be paid off before appellant could redeem the land," and decided the suit in the following terms:—"The bonds in question are for moneys which according to the bonds fell due (two of them) on the 13th April, 1869, one in 1865, and the fourth in December, 1876: the moneys due under them were all barred by limitation long before the suit was filed—31st May, 1880. The respondents urge, and the lower Court apparently inclines to the view, that the bonds are one and all saved by a clause which exists in each bond: 'And when any one shall redeem the field he must first pay the money due under the bond.' But all the bonds contain a fixed date upon which the money due under them was to fall due, and be paid. With this particular date given, I consider that the words already quoted allude to an earlier alternative date, if they refer to any date for payment at all. But they are not given as an alternative date. They would seem to have been intended as burdens upon the land without payment of the stamp-duty for a formal mortgage-deed. Finding, as the Court does, that the moneys due were all barred by limitation except those due under the bond for Rs. 24, long before any attempt was made to redeem the fields, the Court also finds that respondents had a right to refuse redemption or insist first upon payment of the moneys under the bond for Rs 24, before giving credit for the moneys due under the mortgage-deed. Seeing, however, that by the time the suit was brought the respondents had by their *laches* allowed these moneys also to become barred, the Court finds the plea in favour of appellant and decides that his claim should not have been dismissed. This Court therefore decrees the appeal, and directs that the judgment and decree of the lower Court be amended into a decree for his claim but without costs in the lower Court. The costs of the appeal will be borne by respondent."

Allu Khan has appealed to this Court on the ground that the supplemental bonds do create a further charge upon the estate; that if the date of the cause of action be, as alleged by the plaintiff (respondent) and found by the lower appellate Court, the 23rd

May, 1879, none of the bonds is beyond time; and that their conditions are binding on the respondent (plaintiff), who ought not to be allowed to redeem the land without satisfying them. For the respondent it has been argued that the bonds created no charge on the land, but personal obligations only; and that although Allu Khan might, with reference to them, have refused redemption to Bakar Khan, or to Bakar Khan's heirs, he cannot do so to the plaintiff, who is not affected by any obligation of the mortgagors which is not a charge on the land. To me it seems that no question of limitation which deserves serious consideration arises on these pleadings; for the bonds have not been put in suit. They are pleaded merely as a bar to the equity of redemption; and I am clearly of opinion that their terms must now be treated as concurrent with the pledge, and that until they are discharged the equity of redemption is postponed.

Their effect in this respect is, as it seems to me, the true point for consideration. The question is not one of those referred to in the former clause of s. 24, Act VI of 1871; nor is it one which is as yet covered by statute. It is one, therefore, regarding which we have to act "according to justice, equity and good conscience." The case is not one of priority of incumbrance as between a first and subsequent incumbrancer; but it is one between a representative of the mortgagor and a mortgagee, who claims to hold the pledge until certain debts subsequent to that of the original mortgage loan be satisfied.

The Roman Law by a rescript of the Emperor Gorrdian ("*etiam ob chirograph: pecun: pignus tenere posse*") allowed a mortgagee to retain the pledge, as against the mortgagor, till all debts due to him were satisfied:—"*Si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore reddatur vel offeratur quae sine pignore debetur, eam restituere propter exceptionem doli mali non cogeris* (1)." And the French law (cl 2, art. 2082 of the *Code Civil*) is to the same effect:—"*S'il existait de la part du même débiteur, envers le même créancier, une autre dette contractée postérieurement à la mise en gage, et devenue exigible avant le payement*

(1) "Should you have been placed in possession of the property, a plea of fraud will prevent your being compelled to restore it, until that money also which, though not covered by the mortgage, is due to you from the mortgagor, be paid or tendered."

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de la première dette, le créancier ne pourra être tenu de se dessaisir du gage avant d'etre entièrement payé de l'une et de l'autre dette, lors même qu'il n'y aurait eu aucune stipulation pour affecter le gage au payement de la seconde" (1). The English law is less favourable to the mortgagee; but even under it (Fisher on the Law of Mortgage, 2nd ed. para. 1215, p. 664) "debts which form a lien on the estate, as debts by mortgage, further charge, judgment, or statute, may be tacked against the mortgagor, his sureties, and all others claiming under him, including mesne incumbrancers; and the reason given is, that the person who took the security, trusted to the hold which he already had on the land." The usage in force in these Provinces was thus formulated by the Court of Sudder Dewanny in 1853, in *Khyratee Ram* v. *Chenoo* (2):—"It will be found on reference to the printed decisions of the Court, of which a few are cited in the margin, that the practice of tacking bonds of subsequent date to the original mortgage, which is thereby rendered liable for the discharge of the aggregate amount, is far from uncommon, and that it has been fully recognized by the Courts (3)." And in 1860—*Hanuman Pershad* v. *Sheo Narayan Sookul* (4)—the Court remarked:—"The terms of the bond, which is not disputed, are distinct. The borrower engaged to pay off that sum *before* liquidating the mortgage loan, or in other words tacked it to the mortgage, which the lower Courts have considered to be discharged by the mere payment of the mortgage loan. The property, therefore, still remains saddled with this liability, and the mortgage has not been redeemed."

The mortgagors and the mortgagee in this case are all of the same family. It is not denied that the mortgages referred to in the supplemental bonds are those which the respondent is now seeking to redeem; and although the bonds are not scientifically drafted, so as to charge the estate in so many words, their terms are such as to leave no doubt in my mind of its having been the intention of the contracting parties that the equity of redemption should be

(1) "If by the same debtor there be due to the same creditor another debt which, although contracted subsequently to the mortgage, has fallen due before the former debt is satisfied, the creditor cannot be compelled to divest himself of the mortgage, until both debts have been satisfied, even though there may have been no condition charging the property for payment of the latter debt."

(2) 8 S. D. A. N.-W. P. (1853) 726.

(3) at p. 728

(4) 8 S. D. A. N.-W. P. 1860, p. 122.

postponed till the money advanced under them had been repaid The lower appellate Court finds this; for the Judge writes:—"They (the bonds) would seem to have been intended as burdens upon the land, without payment of the stamp-duty for a formal mortgage-deed." The justice of charging the land for payment of the principal sum due under the Rs. 45 bond (bond C) is admitted in the plaint; the lower appellate Court has included that amount in its decree; and the bond for Rs. 24 (bond D) seems to stand on precisely the same footing.

That the respondent, who seeks to redeem the entire mortgage, trusting, of course, to being able to compel the other mortgagors, or their representatives, to contribute in the future, is in no better position as regards the equity of redemption than the mortgagors themselves, seems to be so plain as not to need arguing. "He who seeks equity must do equity;" and it would seem to me unjust and inequitable to set aside in this case the obligation contained in the bonds, and to declare a representative of some of the mortgagors entitled to re-entry on mere payment of the original mortgage-loans. I would decree the appeal with costs.

STRAIGHT, J.—I concur in the order proposed by my honorable colleague.

Appeal allowed.

CIVIL JURISDICTION.

1881 *August* 1.

Before Mr. Justice Straight and Mr. Justice Duthoit.

HARSARAN SINGH (PLAINTIFF) *v.* MUHAMMAD RAZA AND OTHERS (DEFENDANTS).*

Rejection of application to appeal as a pauper—High Court, powers of revision of—Act X. of 1877 (Civil Procedure Code), ss. 592, 622.

An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected. *Held*, on an application to the High Court for revision, that s. 622 of Act X. of 1877 did not apply to a proceeding of so purely an interlocutory a character as mentioned in s. 592, and such application therefore could not be entertained.

THIS was an application to the High Court by one Harsaran Singh for the exercise of its powers of revision under s. 622 of Act

* Application, No 47 of 1881, for revision under s 622 of Act X of 1877 of an order of M. S. Howell, Esq., Judge of Jaunpur, dated the 28th February 1881.

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X of 1877. On the 24th February, 1881, Harsaran Singh applied by his pleader to the District Judge of Jaunpur for permission to appeal as a pauper against a decree of the Subordinate Judge of Jaunpur dismissing a suit brought by him for possession of certain immoveable property. The District Judge rejected this application on the 28th February, 1881, on the ground that, under ss. 404 and 592 of Act X of 1877, such an application could not be presented by a pleader but must be presented personally. Harsaran Singh applied to the High Court to revise the District Judge's order under s. 622 of Act X of 1877, on the ground that the District Judge was wrong in holding that a pauper appeal must be presented by the appellant in person; and that, assuming that he was right in so holding, he should in this case have allowed time for the personal appearance of the applicant.

Munshi *Hanuman Prasad*, for the applicant.

Mr. *Colvin*, for the opposite party.

The judgment of the Court (STRAIGHT, J., and DUTHOIT, J.,) was delivered by

STRAIGHT, J.—We are clearly of opinion that this application was inadmissible and cannot be entertained. S. 622 of the Civil Procedure Code does not in our judgment apply to a proceeding of so purely an interlocutory character as that mentioned in s. 592. The application is rejected with costs.

Application rejected.

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APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Duthoit.

SHADAL KHAN (PLAINTIFF) *v.* AMIN-UL-LAH KHAN (DEFENDANT).*

Res judicata—"Same parties."

M, in 1866, brought a suit against *A*, her son *S*, *B* and *C*, who like her all claimed a right to inherit the estate of *K* deceased, for her share by inheritance in *K*'s estate, alleging that she had been lawfully married to him. She only denied *A*'s right to inherit, who claimed as *K*'s adopted son; admitting the right of *S*, who claimed as her lawful son by *K*, and that of *B* and *C*, who claimed as wife and daughter respectively of *K*. *S* supported his mother's claim. *A*, *B*,

* Second Appeal, No. 154 of 1881, from a decree of H. G Keene, Esq., Judge of Meerut, dated the 30th November, 1880, reversing a decree of Rai Bakhtawar Singh Subordinate Judge of Meerut, dated the 21st August, 1880.

and *C* denied that *M* had been lawfully married to *K*, and alleged that *S* was the son of *M*, not by *K*, but by another person It was decided in that suit that *M* had been lawfully married to *K*; that *S* was the lawful son of *K* by *M*; and that *A* was not the adopted son of *K*. In 1880 *S* sued *A* for possession of *C's* share in such estate, *C* having died, claiming as *C's* step-brother and heir. *A* set up as a defence that *M* was not *K's* wife, nor was *S* *K's* son. *Held* that, inasmuch as, although in the former suit *A* and *S* stood together in the same array, they were in fact opposed to each other, *S* being on the side and supporting the case of his mother, and *A* being the true defendant, such suit was one between the same parties as the second, and the matter of *S's* legitimacy having been raised and finally decided in the former suit by a competent Court, was *res judicata* and could not be again raised in the second suit.

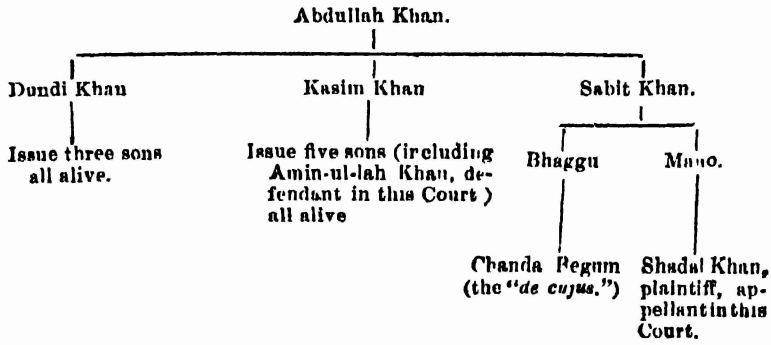
THE facts of this case are sufficiently stated in the judgment of the High Court.

Shaikh *Maula Bakhsh*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the High Court (TYRRELL, J., and DUTHOIT, J.,) was delivered by

DUTHOIT, J.—This is an appeal from a decree of the Judge of Meerut, reversing a decree of Rai Bakhtawar Singh, Subordinate Judge. To make the case intelligible it is necessary to state a genealogical table:—



The suit was by Shadal Khan against Amin-ul-lah Khan in respect of the landed property of Chanda. Chanda died on the 6th August, 1879, and Amin-ul-lah has procured the entry of his own name in the Collector's book for the land. The suit was instituted on the 3rd August, 1880. The plaintiff alleged that, as Chanda's step-brother, he, and not Amin-ul-lah, was her heir. Amin-ul-lah's

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defence was (i) that Mano was not Sabit Khan's wife nor was Shadal Sabit Khan's son; and (ii) that Chanda had bestowed the property upon him shortly before her death, while she was in full possession of her faculties. The issues stated in the Court of first instance were briefly these: (i) Was Mano lawfully married to Sabit Khan, and is Shadal Khan their son or not? ii Has the defendant any right as donee of Chanda or not. On the former issue the Subordinate Judge held that the fact of Mano's marriage to Sabit Khan had been distinctly affirmed by the Judge of Meerut in 1866, on appeal from a decision of the Munsif of Bulandshahr, and that by other evidence adduced by Shadal Khan in the present suit the same fact, and the legitimate descent of Shadal Khan from Sabit Khan, had been fully established. On the latter issue he found that the story of the alleged gift by Chanda to Amin-ul-lah was fictitious, and unsupported by any trustworthy evidence. Accordingly he decreed the plaintiff's claim. Amin-ul-lah appealed, taking the same ground as he had taken in the Court of first instance. The Judge confined himself chiefly to the consideration of the former of the two issues as above; and came upon it to an altogether different conclusion from that of the Subordinate Judge. He found that the judgment of this Court dated the 9th October, 1866, was not receivable in evidence, and that the other evidence in support of the averment that Shadal Khan was Sabit Khan's son and Mano, his wife, was unsatisfactory. Upon the latter issue his finding is in these words: "I am by no means satisfied with the reasons assigned by the Subordinate Judge for not believing the evidence of an oral gift made by Chanda in favour of the appellant shortly before her death: there is no other proof." It has been urged before us on behalf of Shadal Khan in second appeal that the lower appellate Court has erred in rejecting the judgment of 1866 as not receivable in evidence; that there is ample other evidence on the record showing that the appellant is the legitimate son of Sábit Khan; that the story of the gift by Chanda to Amin-ul-lah is a fiction; and that even if true the gift, as being unaccompanied by immediate delivery of possession, was of no effect. As regards the alleged gift we are entirely of the opinion of the Subordinate Judge. We consider the evidence advanced in support of it defective and untrustworthy. And we note as a curious coincidence that in the

litigation of 1866 also Amin-ul-lah Khan had a double line of defence; he then declared himself to be the adopted son of Sabit Khan. There is other evidence upon the record which supports the appellant's account of his family *status*, and the case appears to us to turn mainly upon the weight to be attached to the judgment of the 9th October, 1866. And to explain our views upon this point it will be necessary to state the circumstances of the litigation which resulted in the judgment under reference. Sabit Khan died in August, 1865. On the 25th October, 1865, the patwari reported that in accordance with a testamentary disposition of the property of the deceased the names of Bhaggu (widow), Chanda (daughter), Shadal Khan (son), and Amin-ul-lah Khan (nephew), should be entered in the revenue register, each for one-fourth of the deceased's landed estate. On the 28th idem Bhaggu objected to the register being so amended on the ground that Shadal Khan was not a son of the deceased, and that she herself was in sole possession of the property, and managed it through her adopted son Amin-ul-lah Khan. On the 7th November, 1865, petitions were presented by Shadal Khan, Amin-ul-lah Khan, Bhaggu, and Chanda, in which it was stated that they had come to an arrangement in the terms of the patwari's report, and it was requested that the register might be amended as proposed therein. This was accordingly done. On the 2nd August, 1866, Mano sued for her share under Muhammadan law in the inheritance of Sabit Khan, on the allegation that she had been lawfully married to him, and that she was no party to the arrangement of the 7th November, 1865. She admitted the right of her son and of Bhaggu and Chanda to share in the inheritance, but denied that Amin-ul-lah Khan had been adopted by Sabit Khan, and asked that he might be excluded from it. Amin-ul-lah Khan, Shadal Khan, Bhaggu and Chanda were made defendants to the suit. Shadal Khan, in whose house, as found by the Judge, Mano was living, supported his mother's claim. The other defendants denied the marriage of Mano with Sabit Khan, and averred that she was a "*dom*" girl on the establishment, and had been married to one Rustam, another servant, by whom, and not by Sabit Khan, Shadal Khan had been begotten upon her. Among the issues settled in the cause was the following:—"Is plaintiff widow of the deceased?"

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And in considering the plea in appeal which was concerned with this issue the Judge wrote thus :—"The question then remains to be considered, if from the evidence before me a satisfactory decision can be arrived at as to whether Mano plaintiff can be considered according to Muhammadan law to have held the position of a wife, and in doing so, the position held by Shadal Khan is necessarily involved, for if he was acknowledged by the family and by deceased as a legitimate son, his mother must be considered as a married woman." Upon the question so before him the Judge found that the proof of the acknowledgment by Sabit Khan of Shadal Khan as his legitimate son was ample, and that, this being so, the lawful marriage of Mano to Sabit Khan must, in accordance with the ruling of the Sudder Dewanny Adawlat in *Hunsoo* v. *Wuhee-dool-nissa* (1) be presumed. He found that the story of the adoption of Amin-ul-lah Khan was false; and holding that the plaintiff had established her right to a share in the inheritance along with Bhaggu, Chanda and Shadal Khan, and to the exclusion of Amin-ul-lah Khan, decreed her claim with costs.

In the suit now in appeal the lower appellate Court has held that the judgment of 1866 "can throw no light on the present case, as it gives no clue to the conduct of either the appellant (Amin-ul-lah Khan) or the respondent (Shadal Khan)" and is not relevant under s. 41 of the Indian Evidence Act, because the Judge in delivering that judgment was not a competent Court in the terms of that section. But the judgment of 1866 is pleaded as showing *res judicata* in the terms of s. 40, not 41, of the Evidence Act, and as such it is, as it seems to us, effectively pleaded. The law as regards the admissibility in evidence of former judgments has been recently discussed by the Calcutta Court in *Gujju Lall* v. *Fatteh Lall* (2) and in the conclusions of that judgment we fully concur. That the matter now in suit as regards the legitimacy of Shadal Khan was directly and substantially in issue in the suit of 1866, that the decision in that suit has become final, and that it was the decision of a competent Court, are undeniable facts. The only question regarding it which appears to us open to discussion is whether the former suit

(1) S. D. A. N.-W. P., 1864, vol. i, p. 380. (2) I. L. R., 6 Calc. 171.

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was a suit between the same parties as the present. We think that this question must be answered in the affirmative.* Both parties to the present suit were parties to the former one; and although in the former they nominally stood together in the same array, yet as a fact they were opposed to each other, Shadal Khan being on the side and supporting the case of his mother, the plaintiff, and Amin-ul-lah Khan being the true defendant in the cause. With reference to the above considerations and reasons we hold that the finding of the lower appellate Court is erroneous. The decree of the lower appellate Court is reversed, that of the Court of the Subordinate Judge of Meerut is restored, and this appeal is decreed with costs.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

1881 *August* 15.

RAM LAL (DEFENDANT) *v.* TULA RAM (PLAINTIFF).*

Suit by Hindu father for compensation for the loss of his daughter's services in consequence of her abduction—Compensation for costs of prosecuting abductor—Res judicata—Act X of 1877 (*Civil Procedure Code*), *s.* 13.

A Hindu sued for compensation for the loss of his daughter's services in consequence of her abduction by the defendant, and for the costs incurred by him in prosecuting the defendant criminally for such abduction The defendant was convicted on such prosecution. *Held* that the decision of the Criminal Court did not operate under s. 13 of Act X of 1877 to bar the determination in such suit of the question whether the defendant had or had not abducted the plaintiff's daughter. Also that the plaintiff was entitled to recover the costs of such criminal proceedings.

The daughter in this case was a married woman, who had been deserted by her husband, and at the time of her abduction was living with the plaintiff her father.

Held by STUART, C. J, that the suit by the father for compensation for the loss of his daughter's services in consequence of her abduction was under the circumstances maintainable.

Held by OLDFIELD, J., that a suit by a Hindu father for the loss of his daughter's services in consequence of her abduction is not maintainable

THE plaintiff in this suit claimed, *inter alia*, Rs. 1,000, as compensation for injury to his reputation and for the loss of his

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* Second Appeal. No. 63 of 1880, from a decree of D. M Gardner, Esq, Judge of Agra, dated the 6th August, 1879, modifying a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Agra, dated the 18th April, 1879.

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daughter Batasia's services, in consequence of her abduction by the defendant, and Rs. 300 the costs incurred by him in prosecuting the defendant criminally for such abduction. The defendant set up as a defence to the suit, *inter alia*, that he had not abducted the plaintiff's daughter. It appeared that Batasia, the plaintiff's daughter, was a married woman, and that her husband had deserted her, and that she had lived with her father from the time of her husband's desertion. It also appeared that the defendant and certain other persons had been criminally prosecuted by the plaintiff for abducting Batasia from his house, and that the defendant had been convicted of that offence, and punished with imprisonment and fine. The Court of first instance found, on evidence recorded by it and on the evidence recorded in the criminal proceedings against the defendant, that the defendant had abducted the plaintiff's daughter from his house; and it gave the plaintiff a decree for Rs. 500 for the injury to his reputation caused thereby, and dismissed his other claims. On appeal by the defendant it was contended on his behalf, *inter alia*, that it was not proved that he had abducted the plaintiff's daughter. The lower appellate Court held that, as the Criminal Court had decided that the defendant had abducted the plaintiff's daughter, the question whether he had or had not done so was, regard being had to the provisions of s. 13 of Act X of 1877, *res judicata* and could not be re-opened. It also held that the plaintiff's claim for compensation for injury to his reputation in consequence of his daughter's abduction by the defendant was not maintainable, and moreover that it was not shown that the plaintiff's reputation had suffered thereby; but that the plaintiff was entitled to compensation for the loss of his daughter's services, and to recover the costs incurred by him in his criminal proceedings against the defendant. It accordingly gave the plaintiff a decree for Rs. 200 for the loss of his daughter's services, and Rs. 300 the costs incurred by him in prosecuting the defendant.

On second appeal by the defendant it was contended on his behalf that the question whether he had or had not abducted the plaintiff's daughter was not *res judicata*, by reason that the Criminal Court had already decided such question; that the claim for the costs incurred by the plaintiff in prosecuting the defendant

were not recoverable by suit; that a claim by a father for compensation for the loss of his daughter's services by reason of her abduction was not maintainable; and that the plaintiff could not maintain such a claim, as his daughter's husband was alive.

Mir *Zahur Husain*, for the appellant.

Mr. *Conlan* and Babu *Ratan Chand*, for the respondent.

The Division Bench (STUART, C. J., and OLDFIELD, J.,) before which the appeal came for hearing, by an order dated the 19th May, 1880, remanded the case to the lower appellate Court to try the issue whether the defendant had or had not abducted the plaintiff's daughter, the order of remand being as follows:—

OLDFIELD, J.—The lower appellate Court must decide in this suit whether or not the defendant did abduct the plaintiff's daughter as alleged. The judgment of the Criminal Court does not operate to prevent the Civil Court from determining the issue under s. 13 of Act X of 1877 as amended. This issue is remitted accordingly to the lower appellate Court for trial.

The lower appellate Court found that the defendant had abducted the plaintiff's daughter as alleged. On the return of this finding the High Court (STUART, C. J., and OLDFIELD, J.,) delivered the following judgments:—

STUART, C. J.—This is an appeal from a decree by the Judge of Agra, by which he allowed damages to the extent of Rs. 500 and costs to the plaintiff against the defendant for the abduction and seduction of his the plaintiff's married daughter, and at the hearing I expressed some doubts as to whether such a suit would lie. But on further consideration I have arrived at the conclusion that on the facts before us this suit may be maintained and damages claimed. Both Courts have recognized the principle of such a claim and have awarded damages; the Judge simply modifying the order, but in amount allowing the sum which was decreed by the first Court.

The counsel for the respondent referred us to an English case, that of *Harper* v. *Luffkin* (1), where Lord Tenterden, C. J., on a motion for a new trial, held that the father was a sufficient plaintiff

(1) 7 Barn. & Cress. 387.

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in the action, and the verdict for damages in his favour was upheld. Such a ruling, however, proceeded on the fiction that the daughter, though a married woman, might still under the circumstances be considered as her father's servant, his Lordship observing: "Unless he (the husband) interferes, it by no means follows that such a relation (that of master and servant) may not exist, *especially as against third persons who are wrong-doers.*" The last words appear to recognize a principle of parental or family authority which might be usefully applied to the present case; but the English theory on which the remedy for such a wrong as that of seduction of a young woman is based is a theory I do not find to have any place in the law of this country, and I am certainly not inclined in any way to encourage its introduction into the legal system of India; and in other European countries, that is, in European countries other than England, the remedy is afforded on the much more intelligible ground of being a wrong to the woman herself, as for example, in the law of Scotland at the present day, in which country the woman needs no help from her father or other relation, but may sue directly for the wrong done to her, that is of course, where she is of the proper age for maintaining a suit of the kind. But the present case is that of a minor deserted by her husband, and taking refuge in her father's house, where she continued to reside; and it seems to me reasonable and just that the father should under the circumstances be allowed to complain of the seduction of his daughter to a Court of Justice, especially in such a case as the present, seeing that the parental control and authority of a father in India over his children do not appear to be so entirely destroyed as it is in England in the case of a married daughter, but which control and authority are in this country retained by the father to a considerable extent, and recognized whenever circumstances may bring him and his daughter together domestically. Here, according to the finding returned to us by the Judge, the daughter had been married ten years, and was very young at the time of her marriage, and during seven of these years her husband had been away from her in another and distant part of the country, and it was not known, when the present suit was brought, whether he was dead or alive. On being so deserted by her husband she naturally sought refuge in her father's house, became domesticated

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with him, and, her mother being dead, she attended to her father's household affairs, and it was while thus under the protection of her father, and rendering him such services as I have indicated, that she was abducted away by the defendant and seduced. Now it appears to me that it would be a very unsatisfactory state of the law in this country if such conduct against the peace and honor of respectable families were allowed to pass without a remedy, and I think we must for that remedy hold that the suit at the instance of the father was properly and validly entertained by the lower Courts. My colleague Mr. Justice Oldfield and I have considered the question as to the amount of damages. The Judge has assessed these at Rs. 500, but I agree with my colleague that the damages might be reduced by Rs. 200, thus leaving Rs. 300 to be recovered by the plaintiff. To this extent therefore I would modify the decree of the lower appellate Court, and in other respects dismiss the appeal with proportionate costs in all the Courts.

OLDFIELD, J.—The plaintiff is the father of Batasia, a married woman, who has been deserted by her husband for some years, and since the desertion she lived with her father until she was abducted from his house by the defendant with whom she has since resided. The plaintiff prosecuted the defendant in the Criminal Court for the abduction, and obtained his conviction and punishment, and he has now brought this suit to recover damages, and he claims them for the injury to his reputation, for the loss of his daughter's services, and for the value of certain jewels taken with her, together with the costs which he incurred in the criminal prosecution. The Court of first instance gave a decree for damages to the amount of Rs. 500 due to loss of reputation and dismissed the rest of the claim. Both parties appealed to the Judge, who disallowed the damages decreed by the first Court, but awarded Rs. 300 as costs of the criminal prosecution and Rs. 200 for the loss by the plaintiff of the services of his daughter. The defendant has preferred an appeal to this Court.

The decree in respect of the recovery of the costs of the criminal prosecution seems unopen to objection. The plaintiff's daughter, after her husband's desertion of her, had her home with her father, whose duty it was to protect her, and to bring to justice

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the man who had abducted her, and he is entitled to recover from the latter the costs of the prosecution. The claim, however, in respect of the loss of the daughter's services stands on quite a different footing. It has evidently been brought with reference to the law of England as to an action for seduction, where the basis of the action is founded, not upon the wrongful act of the defendant in the seduction, but upon the loss of service of the daughter, in which service the parent is supposed by a fiction to have a legal right or interest.—Broom's Commentaries, 3rd edition, pp. 77 and 836. It would be very undesirable to introduce a fiction of this kind into the law of this country. The plaintiff cannot be allowed to maintain a suit on a contract for service which is not seriously asserted, nor indeed found to exist in fact, and which is not consonant with Hindu customs. Hindu women are no doubt dependent to a great extent on their male relatives, and they have certain household duties which they are expected to perform, but their position is not one of servitude, from which any contract of service can be implied. I would modify the decree of the Judge by disallowing the sum of Rs. 200 decreed as damages for loss of service, with proportionate costs in all Courts.

Decree modified

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Duthoit.

BIRJ MOHAN SINGH AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF ALLAHABAD AS PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD (DEFENDANT).*

Suit against Municipal Committee—Claim for a declaration of right—Limitation—Act XV of 1873 (*N.-W. P. and Oudh Municipalities Act*), *s.* 43—*Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 120.

The lessee of certain land belonging the plaintiffs, situate within the limits of a Municipality, applied to the Municipal Committee for permission to establish a market on such land, and such permission was refused by the Committee on the 26th November, 1878. Meanwhile the plaintiffs, in behalf of the lessee and in their own behalf as proprietors of such land, applied to the Committee for such permission, sending such application by post. No orders were passed by the Committee on such application because it had come by post. On the 18th April, 1879,

* Second Appeal, No. 1366 of 1880, from a decree of R. D. Alexander, Esq., Judge of the Small Cause Court, Allahabad, exercising the powers of a Subordinate Judge, dated the 18th September, 1880, affirming a decree of Babu Mrittonjoy Mukarji, Munsif of Allahabad, dated the 30th September, 1879.

the plaintiffs sued the Committee for a declaration of their right to establish a market on such land, and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing The cause of action alleged was the refusal of the Committee of the 26 h November, 1878.

Held by STUART, C.J., on the question whether such suit was barred by the provisions of s. 43 of Act XV of 1873, not having been brought within three months next after the date of the alleged cause of action, that it was not so barred, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under that Act, in which compensation was claimed, and not to those in which compensation was not claimed; and that therefore the present suit was not governed by the provisions of that section, but of No. 120, sch. ii of Act XV of 1877.

Also that the rejection of the lessee's application gave the plaintiffs a cause of action as there was privity between them and the lessee; and that, as there was nothing in the Municipal rules prohibiting the presentation of an application by post, the application of the plaintiffs should not have been rejected.

Held by DUTHOIT, J., that the suit of the plaintiffs was governed by the provisions of s. 43 of Act XV of 1873, and was therefore beyond time.

The Municipal Committee of Moradabad v. *Chatri Singh* (1); *Manni Kasaundhan* v. *Crooke* (2); and *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (3) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Pandit *Ajudhia Nath* and Babu *Oprokash Chandar Mukarji*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The High Court (STUART, C. J., and DUTHOIT, J.,) delivered the following judgments:—

STUART, C. J.—The suit in this case was instituted on the 18th April, 1879, against the Collector of Allahabad as President of the Municipal Committee of that city, in consequence of the refusal of the Municipal Committee to allow the plaintiffs permission to erect certain buildings, and to open a market on land in the city of Allahabad, which it is not disputed is their own; and the plaintiffs gave notice of the institution of the suit under s. 424 of the Procedure

(1) I. L. R., 1 All. 269. (2) I. L. R., 2 All 296.
(3) I. L. R., 6 Calc 8.

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Code to the Collector as President of the Municipality, and, in that capacity, as a public officer within the meaning of the section, such notice being dated the 21st January, 1879. This notice was objected to by the defendant as being informal and not in sufficient compliance with s. 424. But at the hearing of this appeal this objection was not insisted on. The plaint sets out that the plaintiffs are the absolute proprietors and possessors of the land in question; that it is within the jurisdiction of the Municipality of Allahabad; that on the 27th September, 1878, a petition was presented by one Mangu, bania, a lessee of the plaintiffs, and that another petition was presented on the 22nd November, 1878, by the plaintiffs themselves, in compliance with the rules of the Municipality, for permission to build houses and shops and to establish a *mandawi* or market on the lands therein mentioned, but the plaintiffs' petition was rejected on the 26th November, 1878; and that they, the plaintiffs, were obliged to desist from building the houses and shops and establishing the market. The plaintiffs, therefore, prayed for the following reliefs: (i) that they be declared competent and entitled to build shops and establish a market on the land therein mentioned, and which is owned and possessed by them; and (ii) that a perpetual injunction be issued to the defendant as representing the Municipality directing him not to interfere with or obstruct the building of shops and establishment of a market as claimed. The plaintiffs did not ask for damages, although they asserted in their plaint that the refusal of their application by the Municipality was a denial of the exercise of their proprietary right, and was calculated to cause substantial injury to them; the cause of action for the other reliefs they asked being the order of the Municipality dated the 26th November, 1878, by which their application was rejected. In defence, besides the objection to the notice that was given under s. 424, but which was abandoned before us, the defendant further objected that the Local Government had not been made a party to the suit under s. 28 of the Municipality Act, but this objection was also abandoned. The remaining pleas were a plea of limitation, and on the merits that similar applications had been made by previous applicants in the same right and refused by the Municipality, and that the plaintiffs had shown no cause of action. The Munsif dismissed the suit, holding that on the facts there was no cause of

action against the defendant, in other words, in effect, that the Municipality were in such a case an irresponsible body, and might, as the Munsif's meaning too plainly is, do what they liked, a view of the law which for its absurdity it is unnecessary to dwell upon. The lower appellate Court in its judgment took no notice of the defendant's plea of limitation, but affirmed the Munsif's order dismissing the suit, not on the Munsif's view of the law respecting the irresponsibility of Municipalities, but on the ground that, as the defendant had been sued by the plaintiffs and not by the plaintiffs' lessee, one Mangu, who alone had a right to complain of any tort or illegal act on the part of the defendant, the suit did not lie.

In second appeal to this Court by the plaintiffs the defendant's plea of limitation was not among the reasons assigned, the contention raised by them being directed against the ground of the lower appellate Court's judgment that the rights respectively of the plaintiffs and their lessee were separate and distinct, the plaintiffs' contention on the contrary being that there was such a privity between them and their lessee as to enable them in their suit to proceed upon all that had occurred between the defendant and Mangu, and that therefore their suit ought not to have been dismissed. But although the plea of limitation is not among the reasons of appeal before us, it was pleaded, as the record shows, in the first Court, and we are bound to notice and dispose of it.

By this plea of limitation it is urged that, as the cause of action on the plaintiffs' own showing arose on the 26th November, 1878, and as the suit had not been brought until the 18th April, 1879, a period of more than three months limitation provided by s 43 of the Municipality Act had elapsed, and the suit was therefore barred. The answer to this plea of limitation was that the present suit is not one of the class contemplated by s. 43, inasmuch as the plaint does not ask for damages or any relief of a pecuniary character, and that therefore the limitation pleaded does not apply to the suit, and I am of opinion that that is a sufficient answer to the plea.

By s. 43 of the Municipality Act, XV of 1873, it is provided: "No suit shall be brought against a Committee or any of their officers, or any person acting under their direction; for any-

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thing done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of the Committee, or at the place of abode of such person, stating the cause of suit and the name and place of abode of the intended plaintiff. Unless such notice be proved, the Court shall find for the defendant. Every such suit shall be commenced within three months next after the accrual of the cause of suit and not afterwards. If any person to whom such notice is given shall, before suit is brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover." It was argued on behalf of the defendant that this section applied to "all" suits whatever brought against the Committee for anything done under the Act, and that the special limitation of three months provided by the section was co-extensive with such a reading of it, and that as the present suit had not been brought within the three months after the accrual of the cause of action it was barred. But this contention leaves out of view the last clause of s. 43 by which it is provided that if "sufficient amends" be tendered by the defendant the plaintiff shall not recover. This to my mind clearly shows that the kind of suit contemplated by s. 43, and for all its purposes, is a suit in which pecuniary amends or damages are claimed. The whole provisions of s. 43 must be read together, and as the present suit merely asked for a declaration of right and for an injunction, and did not ask for damages, the limitation of three months provided by the section has no application. The proper limitation therefore is six years as provided by No 120, sch. ii of the present Limitation Act, and the present suit was within time, and ought to have been disposed of on the merits. That such is the true meaning of s. 43 I am quite clear, and I observe it follows a ruling by Spankie, J., and myself in *Manni Kasaundhan* v. *Crooke* (1). There the suit was for a declaration of right to reconstruct buildings which the Municipality had directed to be removed, and for compensation in damages. In our judgment, however, we took a full view of the section in its application to both classes of suits, those in which damages were asked, and those in which other reliefs without damages were sought. We observed: "The suits contemplated by the Act seemed to be those claiming relief of a pecuniary character for

(1) I. L. R., 2 All. 296.

some act done under the Act (XV of 1873) by the Committee or any of their officers, or any other persons acting under their directions, and for which damages can be recovered from them personally. The last paragraph of s. 43 bars all recovery if the person to whom the notice prescribed by the section has been given before the suit is brought tenders sufficient amends to the plaintiff" We then pointed out that the suit then before us was one in which damages were asked, but we at the same time went on to observe: "On the other hand, if this is not one of the suits contemplated by Act XV of 1873, it is not at all affected by s. 43 of the Act." To the same effect is a ruling by another Division Bench of this Court in *The Municipal Committee of Moradabad* v. *Chatri Singh* (1) (Turner and Oldfield, JJ.), in which it was held that the notice provided by s. 43 of Act XV of 1873 only applied where the suit claimed pecuniary compensation or damages. This view of the law is also supported by a Full Bench ruling of the High Court of Calcutta in *Chunder Sikar Bandopadhya* v. *Obhoy Churn Baychi* (2), where in construing and applying s. 87 of the Bengal Municipal Improvement Act, III of 1864 (and which is identical with s. 43 of Act XV of 1873, Garth, C. J., in delivering the judgment of the Full Bench, observed: "As the relief which has been decreed in these suits is for the specific recovery of land irrespective of any damage for the plaintiff's dispossession, we consider that the 87th section of Bengal Act III of 1861 does not apply. That section, as it seems to us, is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or the honestly supposed exercise, of their statutory powers."

Now these several rulings appear to me to be free from all ambiguity, indeed to be very distinct, and to leave no doubt of their application to all suits whatever of both classes; those on the one hand in which one month's notice must be given to the defendant, and in which damages are claimed, and which must be brought within the special limitation period of three months, and on the other hand those in which the relief sought does not include a

(1) I. L. R. 1 All. 269. (2) I. L. R. 6 Calc. 8.

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claim for damages, and which may be brought at any time within the general limitation of six years. Nor do I see any inconsistency between the requirement of one month's notice and three months limitation, the obvious meaning being that, to enable the plaintiff to sue a Municipality at all, he must give them notice of one month before the suit is brought, but when brought it must stand or fall according as it has been instituted or not within the three months special limitation. For these reasons I would disallow the plea of the special limitation of three months provided by the Municipality Act, and hold that the suit was in time and must be disposed of on all the other pleas urged by defendant.

I have already stated that in my opinion the suit was not open to objection on the score of want of privity between the plaintiffs and their lessee. The contention of the defendant therefore that the plaintiffs had no cause of action because the particular application that had been rejected by the Municipality was not by them, but was the individual application of Mangu cannot be sustained. Mangu's application and that of the plaintiffs in fact formed but one case submitted to the Municipality, and the plaintiffs' application should not have been rejected on the score of its informality, *i.e.* because it had not been presented in person by the plaintiffs themselves, but had been sent by post. It is not denied that the plaintiffs' petition was received by the defendant; on the contrary we are informed by the Subordinate Judge that it was filed in original by the defendant himself, and as to its coming to them by post there is no rule of any of the Municipal Bye-Laws against such a mode of transmission. By Rule 11 of the Municipal Bye-Laws on the "conduct of business" it is merely provided that "*all communications* intended for the ordinary meetings *must reach* the Secretary not later than noon of the day previous to the meeting; and as far as may be practicable the President and Secretary should circulate for the perusal and consideration of the members of the Municipal Committee such papers *as they have received* since the last meeting." Here there is not a word respecting the mode and manner in which communications and papers may be submitted to the Municipal Committee, the rule applying where they have simply "reached" or been "received" by the Committee; and as there is no doubt on that point in the present case, the defendant's objection that the plaintiffs'

petition, although received by them, had been sent by post, is to the last degree idle and frivolous.

There remain the defendant's pleas respecting what had taken place between the Municipality and the plaintiffs' ancestors in 1861 and 1863, but for the determination of these questions there are no sufficient materials on the record for a satisfactory decision, nor do the judgments of the Courts below contain any finding upon them. The case must therefore go back to the Subordinate Judge under s. 562 for disposal of these pleas and on the merits generally. Costs will abide the result.

DUTHOIT, J.—This is an appeal against a decree of the District Judge affirming a decree of the Munsif of Allahabad, by which a suit for declaration of right to build on certain land situate within the limits of the Allahabad Municipality, and for restraining the Magistrate and Collector, as President of the Municipality, from interference therewith, has been dismissed.

The facts of the case may be thus stated. The plaintiffs (appellants), Birj Mohan Singh and seven others, own the land under reference, but have given a lease of the same to Mangu Bakkal. On the 27th September, 1878, Mangu, stating himself to be the lessee of the proprietors, applied to the Municipal Committee by petition, presented in person, for leave to establish a market, and build houses and shops on the land. At an ordinary meeting of the Committee, held on the 26th November, 1878, it was "resolved that permission be refused." Meanwhile, on the 22nd November, 1878, Kishan Prasad, Birj Mohan Singh and Lachhmi Narain, three of the proprietors of the land, had sent by post to the Secretary of the Committee a petition in the following terms:—"With reference to the application of Mangu Chaudhri, filed with our knowledge and consent, for permission to establish a market and build shops and houses on the land belonging to us situated in mauza Minhajpur in pargana Chail, we think it necessary to bring the following particulars to the notice of the Municipal Committee:—(i) The establishment of a market will in no way affect the interests of the Government or of any one else: the place where the market in question is intended to be established is at a

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great distance from the Government market: Mr. White having personally visited the locality expressed his opinion that the establishment of a market there would cause no injury: (ii) excepting the market at Khuldabad, which is old, all the markets *viz.*, the Khalifa, Ali Sujjadganj, Makbulganj, &c., markets have been recently established: had the object of Government been to prevent the establishment of markets other than the Government markets, and to monopolise all the profit for itself, the other markets would not have come into existence: it is to be observed that our land is not nearer to the market at Khuldabad than the other markets, Khalifa, &c., &c.: (iii) if the Committee disallow the application of Mangu Chaudhri for permission to establish a market on our land, justice would demand the removal of the other markets mentioned above also: (iv) our market named Yakubganj which was in the neighbourhood of the land in question, having been taken by the Government for public purposes, we at all events have a preferential right to establish a market as compared with others: (v) when Hanuman Prasad our uncle, who was a loyal subject of Government, thought of establishing a market in 1864, Mr Raikes the former Magistrate of this district satisfied him by giving him a lease of the market at Khuldabad; and it was then that our uncle, pursuant to the directions of the said officer, removed the sheds of grass &c., put up by him for the purposes of a market; our market was never forcibly removed or stopped: (vi) the Government land is in no way interfered with; we are land-owners and intend to open a market on our own land with a view to profit thereby: the establishment of a market and the construction of buildings will be an improvement to the locality, and will be a convenience and comfort to the residents of the neighbourhood: (vii) we shall lose hundreds of rupees if we are not allowed to establish a market. Having therefore presented this application we pray that in view of the above circumstances we may not be prevented from constructing the market, buildings and shops, because all the subjects of Government are entitled to equal privileges."

Upon this petition, as being informally received, no orders were passed. On the 21st January, 1879, the provisions of cl. 1, s. 43, Act XV of 1873, were complied with, and notice of the suit was given. The suit was instituted on the 18th April, 1879. The plaint

alleged that the plaintiffs, who are the proprietors of certain land within the limits of the Allahabad Municipality and in possession thereof, had on the 27th September and the 22nd November, 1878, asked permission to establish a market and build houses and shops upon it; that their request had, on the 26th November, 1878, been refused; and that, as the use of the land for the proposed purpose did not contravene any Municipal rule or bye-law, the Committee was not legally competent to refuse the required permission. The suit was defended on the following grounds:—(*i*) There had been no sufficient compliance with the provisions of s. 28, Act XV of 1873, or with those of s. 424 of Act X of 1877: (ii) according to the plaintiffs' own statement the cause of action arose on the 26th November, 1878, but the suit was not instituted till the 18th April, 1879; it was therefore barred by the special limitation of cl. 3, s. 43, Act XV of 1873: (iii) the plaintiffs had no cause of action, because no application of *theirs* was rejected by the Municipal Committee: (iv) the land in question was, in 1861, granted to the plaintiffs' father for a specific purpose, *viz.*, for the laying out of a garden thereon; had there then been any idea of his wishing to establish a market on it, the land would not have been granted: (v) when in 1863 the plaintiffs' father attempted to build shops on the land, he was prevented from doing so by the then Magistrate; and as no suit was brought to contest such action of the Magistrate, the present suit will not lie. The Munsif framed issues which covered the entire case; but all that he decided was that the discretion of the Municipal Committee as to the grant or refusal of the permission asked for was absolute, and that the plaintiffs had therefore no cause of action. The Judge decided that this view of the law was erroneous, and that the question whether the discretion vested in a Municipal Committee has been rightly or wrongly exercised is one which a Civil Court may consider and determine. But he held that the plaintiffs had no cause of action; for they were on the horns of a dilemma. Either Mangu is their lessee and in possession of the land, or he is not, and the plaintiffs are in possession; if Mangu be in possession, and his lease still holds good, they have failed to show any injury to themselves by the rejection of Mangu's petition; if Mangu be not in possession as their lessee, they have failed to show any such privity between themselves and him as will justify

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the Court in treating the rejection of Mangu's petition as the rejection of their own.

It is contended in second appeal that, inasmuch as by the petition of the plaintiffs (appellants), dated the 22nd November, 1878, the receipt of which is not denied by the defendant (respondent), the application of Mangu was affirmed, and the grant of its prayer was requested, that application became the application of the plaintiffs (appellants); and that as their rights were concluded, and unjustly concluded, under it, they (the plaintiffs) had a good cause of action, and their suit should have been decreed.

Before the merits of the case can be considered, the pleas in bar of the suit must first be examined and disposed of. The plea of incomplete notice has been abandoned. It may be assumed that had the suit been instituted between the 21st and 26th February, 1879, it would not have been statutorily barred. The question next for decision is whether, as instituted subsequently to the 26th February, *i.e.*, more than three months after the accrual of the cause of action, it is, or is not, beyond time in the terms of cl. 3, s. 43, Act XV of 1873. The learned pleader for the appellants has argued that by the terms of cl. 3, s. 43, Act XV of 1873, all suits brought against a Municipality for anything done under the Act are not intended, but those suits only in which [*Manni Kasaundhan* v. *Crooke* (1)] relief of a pecuniary character is claimed "for some act done under the Act (XV of 1873) by the Committee or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally." And the argument is thus supported:—The section must be read as a whole: its object is to allow to the Municipality the opportunity of making some pecuniary amends for wrong done by it or any of its officers, without incurring the cost of litigation: notice of the intended suit has therefore to be given only when pecuniary relief is sought: special limitation applies to those cases only in which notice is required: it applies therefore to suits by which pecuniary relief is sought, and to no others. The argument has in it favour a Full Bench ruling of the Calcutta Court—*Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (2)—entirely, and partly (so far, that is, as

(1) I. L. R., 2 All. 296. (2) I. L. R., 6 Calc. 8.

regards the limited need of notice); the decisions of two Division Benches of this Court,—*The Municipal Committee of Mbradabad* v. *Chatri Singh* (1) and *Manni Kasaundhan* v. *Crooke* (2). The decision of the Calcutta Court, however, on the point of limitation is not founded on the same argument as that now advanced by the appellants. It rests, so far as this point is concerned, entirely upon the belief that it could not have been the intention of the Legislature to assign so short a period of limitation to a suit of the particular nature of that which was then before the Court. After giving the subject full consideration, I fail to see what necessary connection there is between the requirement of one month's notice of a suit and the refusal of a remedy if the suit be not commenced within three months next after the accrual of its cause. It seems to me to be an undue restriction of terms to say that the words "every such suit" in cl. 3, s. 43, Act XV of 1873, shall mean every suit in which notice is required, and no others. The obvious meaning of those words appears to me to be "every suit brought against a Committee or any of their officers, or any person acting under their direction, for any thing done under the Act." The scope of s. 43, Act XV of 1873, is I think two-fold, *viz.*,—(i) in consideration of the rashness of persons in small authority, and the probability that, on deliberation, a body like a Municipal Committee will do justice, and will at any rate prefer to avoid the wasteful expense of defending a bad cause, to provide a "*locus penitentiæ*" for Committees against which a complaint of wrong-doing may have been brought: (ii) in view of the fact that, owing to the frequency of the changes to which its personnel is liable, and other causes not affecting private persons, a Municipal Committee might often be unable to defend successfully a suit brought against it to which it had actually a good defence, to provide a special limitation law for litigation against Municipalities, on assertions of wrong done by them, and thus to prevent their being unduly harrassed. The maxim upon which the Calcutta Court appears to have gone in defining the scope of the limitation clause of s. 43, Act XV of 1873, appears to be "*interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum..*" But the view which I take of the meaning of the law appears to me to be more conformable to

(1) I. L. R., 1 All. 269. (2) I. L. R., 2 All. 296.

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this maxim than the other; and it may, I think, be taken as certain that, if the view which I take be not the true one, the aid of the Legislature will have to be sought by the Executive; for, relying presumably on their special limitation protection, Municipalities are in the habit of destroying their records at brief intervals, varying, it is understood, from one to three years. In the view I take of the law, all to which we have in this case to look, so far as the question of limitation is concerned, is whether the suit is in respect of anything done under the "North-Western Provinces and Oudh Municipalities Act, 1873;" and if it be, then whether it was or was not commenced within three months next after the accrual of the cause of action. That the suit is brought against the Municipal Committee of Allahabad for a thing done by it under the Act, to wit its refusal of a certain permission applied for to it, is, I consider, certain, and so also is the fact that the suit was not commenced within three months next after the accrual of the cause of action *viz.*, the date of such refusal. I would hold, therefore, that the plaintiffs' (appellants') suit was barred by limitation. Incidentally, though perhaps it is unnecessary for me to do so in the view I take of the case, I would remark that by giving notice of their intended action, the plaintiffs (appellants) showed that they considered such notice essential; that if "tort" be injury to the plaintiff from a wrongful act of the defendant, it is difficult to see how the cause of action alleged by the plaintiffs in this case is not founded on tort, or quasi-tort; and that if this be so, notice would seem to have been required under the law as defined by Turner and Oldfield, JJ., in *The Municipal Committee of Moradabad* v. *Chatri Singh* (1). I would (upon different grounds) affirm the decree of the lower appellate Court and would dismiss the appeal with costs.

(1) I. L. R., 1 All. 269.

FULL BENCH.

1881
August 26.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Duthoit.

BIRCH (JUDGMENT-DEBTOR) *v.* RATI RAM (DECREE-HOLDER)*

Rules prescribed by the Local Government under s. 320 of Act X of 1877 (Civil Procedure Code)— Notification No. 671 of 1880 (Judicial Civil Department) dated the 30th August, 1880—Meaning of "decrees for the recovery of money."

Held that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a "decree for money" within the meaning of the Rules prescribed by the Local Government under s. 320 of Act X of 1877 (1).

THIS was a reference to the Full Bench by Straight, J., and Tyrrell, J., of the question "whether a decree for the sale of ancestral land or interest in such land in enforcement of an hypothecation on such land is 'a decree for the recovery of money,' in the sense of the Notification of the Government of the North-Western-Provinces No. 671 of 1880, dated the 30th August, 1880" (1).

Hanuman Prasad and *Nand Lal*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondent.

The following judgment was delivered by the Full Bench :—

JUDGMENT.—On consideration of the terms of ss. 320 and 322 of the Code of Civil Procedure, and of the preamble and paragraphs 10 and 11 of the Rules issued by the Lieutenant-Governor, North-Western-Provinces, with the sanction of the Governor-General in Council, in pursuance of the powers conferred by s. 320 of the Civil Procedure Code, we have no doubt that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a "decree for the recovery of money" in the terms of the preamble of the Notification of the Government of the North-Western-Provinces No. 671, dated the 30th August, 1880. The procedure to be followed by the Collector on the receipt of such a decree is set out in paragraph 10 of the Notification.

* First Appeal, No. 47 of 1881, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 10th March, 1881.

(1) Published at p. 990, *North-Western Provinces and Oudh Gazette*, 9th October, 1880.

1881
August 29.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr Justice Duthoit.

HAFIZ-UN-NISSA (JUDGMENT DEBTOR) *v.* MAHADEO PRASAD AND ANOTHER (DECREE-HOLDERS).*

Rules prescribed by the Local Government under s. 320 *of Act X of* 1877 (*Civil Procedure Code*)—*Notification No.* 671 *of* 1880 (*Judicial Civil Department*) *dated the* 30*th August*, 1880—*Meaning of "with effect from the* 31*st October*, 1880."

Held that effect cannot be given to the Rules prescribed by the Local Government under s. 320 of Act X of 1877 (1) unless an order for sale has been made on or after the 1st October 1880.

On the 30th June, 1879, Mahadeo Prasad and Baldeo Prasad obtained a decree against Hafiz-un-nissa Bibi for money secured by the hypothecation of certain land, which directed that the amount of such decree should be recoverable by the sale of such land. On the 18th May, 1880, the decree-holders applied for the attachment and sale of such land in execution of their decree. On the 26th May, 1880, the Court executing the decree (the Subordinate Judge of Azamgarh) ordered that such land should be attached, and it was attached accordingly. On the 17th June, 1880, the Subordinate Judge made an order directing the sale of such land in execution of the decree, and that the sale should take place on the 21st August, 1880, and that proclamations of sale should issue accordingly. On the application of the judgment-debtor the sale was subsequently postponed to the 20th September, 1880. On the 15th September, 1880, the judgment-debtor applied for the postponement of the sale for one month. On the 16th September, 1880, the Subordinate Judge made an order postponing the sale to the 20th November, 1880. On the 13th November, 1880, the judgment-debtor applied to the Subordinate Judge to transfer the execution-proceedings to the Collector, in accordance with the Rules prescribed by the Local Government under s. 320 of Act X of 1877 [Notification No. 671 of 1880, dated the 30th August, 1880 (1)], on the ground that such land was ancestral land. The Subordinate Judge framed on this application the following issue :—"Whether under the Government Notification No. 671,

* First Appeal, No 22 of 1881, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 18th November, 1880.

(1) Published at p. 990, *North-Western Provinces and Oudh Gazette*, October 9th, 1880.

dated the 30th August, 1880, the execution-proceedings should be transferred to the Collector"? Upon this issue the Subordinate Judge held, having regard to the terms of that Notification, and the Rules therein prescribed by the Local Government under s. 320, that the execution-proceedings should not be transferred to the Collector. He so held on the ground that that Notification did not apply to execution-proceedings in which an order had been made for the sale of the property before the 1st October, 1880, from which date that Notification took effect, bnt only to execution-proceedings in which such an order had been made after that date; and he rejected the judgment-debtor's application.

The judgment-debtor appealed to the High Court, contending that the Subordinate Judge was wrong in holding that the Government Notification related only to decrees executed after the 1st October, 1880. The Division Bench before which the appeal came for hearing (STRAIGHT, J., and DUTHOIT, J.,) referred to the Full Bench the question raised by the appeal, the order of reference being as follows :—

ORDER OF REFERENCE.—The question raised by this appeal is one of considerable importance, and as many cases are likely to come in appeal to this Court with reference to the construction to be placed upon the preamble to the Notification of Government of the 30th August, 1880, No. 671, we think it better to refer the point to the Full Bench for determination.

Munshi *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—As I understand the Notification No. 671 of 1880, and dated the 30th of August, 1880, the date of the decree itself need not be considered; it is the date of the order for sale which is material for determining the question whether the Notification does or does not apply to the particular case; and if such order for sale has been made before the 1st October, 1880, then the Notification does not apply, and the execution of the decree

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must not be transferred to the Collector, but must abide the usual course of law. In the present case the procedure that had taken place is very loosely and inartificially stated in the judgment of the Subordinate Judge, and it is difficult to understand the dates and sequence of the various proceedings to which he refers. But I have looked into the record, and I find that the question in the case before us may be thus simply stated. The date of the decree is the 30th June, 1879, and on the 18th May, 1880, the decree-holder applied for its execution, and on this application an order for execution was made on the 26th May, 1880, and the property was attached. On the 17th June, 1880, an order for sale was made, the first day subsequently fixed for sale being the 21st August, 1880, but on the application of the judgment-debtor the sale was delayed till the 20th September, 1880. On the 15th of the same month of September, that is five days before the sale was to have taken place, the judgment-debtor again applied that the sale might be further adjourned, and upon this application an order was made, dated the following day, the 16th September, the effect of which was to stay the execution until the 20th of the following November. But about a week before that last date, that is, on the 13th November, 1880, the debtor presented an application to the Subordinate Judge, praying that, pursuant to s. 320 of the Procedure Code and the Government Notification, the execution-proceedings might be transferred to the Collector. The Subordinate Judge was of opinion that the order of the 16th September was the proper date to be considered, and as that was anterior to the 1st October named in the Notification, the judgment-debtor's application did not come within its terms, and he therefore refused the application.

But the Subordinate Judge was clearly mistaken in fixing the 16th September as the date to be looked to, for that was merely the date of an order staying the execution of the decree, the one material date being the 17th June, 1880, on which the order for sale was actually made. The Notification therefore pursuant to s. 320 of the Procedure Code does not apply to such a case: and although the Subordinate Judge was wrong in fixing on the 16th September as the date to be considered, his order refusing the application was right.

STRAIGHT, J., and DUTHOIT, J.—The question before us appears to be the following:—At what stage of proceedings, taken against immoveable property in execution of a Civil Court decree, which were commenced before the 1st October, 1880, must effect be given to the Rules issued by the Lieutenant-Governor, North-Western Provinces, with the sanction of the Governor-General in Council, in pursuance of the powers conferred by s. 320 of the Code of Civil Procedure, or in other words, what sense, as regards such proceedings, is to be given to the words "with effect from the 1st October, 1880" contained in the preamble of the Rules? On consideration of the terms of cl. 1, s. 320 of the Code of Civil Procedure, and of those of the preamble and of paragraphs 1 and 2 of the Notification of Government, No. 671, dated the 30th August, 1880, we do not think there can be any doubt that the fact of an order for sale having or not having been passed before the 1st October, 1880, is the fact which governs the operation or non-operation of the rules as regards the particular case of execution of decree.

TYRRELL, J.—The preamble of the Notification No. 671 of 1880 defines and restricts its scope and operation to the execution of such cases only as have effect on *ancestral* land, the sale of which has been ordered by a Civil Court under circumstances stated in the Notification. The question, then, to be determined by the Civil Courts in such cases is, whether the land which they have ordered to be sold is or is not "ancestral land" in the sense of the Notification. The first "rule" prescribed by the Local Government under s. 320 of Act X of 1877, for giving effect to the declaration and objects of the Notification, provides for two steps in procedure in this direction: namely, the time when the Court is to determine the issue of the ancestral or non-ancestral nature of the land (*a*): and what would be the result of a determination that the land is ancestral (*b*). The time or stage for determining the nature of the land is when the Civil Courts have passed orders for the sale: "Every Civil Court *on passing orders for the sale* of any land shall ascertain from the judgment-debtor whether it is ancestral land, and after hearing any objection made by the decree-holder shall, if satisfied that it is ancestral land," deal with it as land to be

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treated by the Collector under the Notification. The second rule proceeds to provide that "when a Civil Court *has ordered* any immoveable property of an ancestral character to be sold," it shall transmit to the Collector certain documents, &c., &c. From these two rules it seem to me that the question of the operation or operativeness of the Notification No. 671 of 1880 comes for the first time before a Civil Court executing a decree when it has passed an order for selling immoveable estate. The Notification would therefore be properly applied to all cases of execution of decrees by such Courts wherein the order for sale comes into existence on or after the 1st October, 1880. But when orders for sale had been passed prior to that date, it seems to me that rules and procedure which are to be applied *pari passu* with and in immediate sequence to such orders for sale, but which had not come into existence, or rather were not operative, till a date subsequent to the date of the order for sale, could not rightly be applied retrospectively to such orders.

PRIVY COUNCIL.

P. C. *
1881
June 16 & 17.

UJAGAR SINGH (PLAINTIFF) *v.* PITAM SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of the North-Western Provinces at Allahabad.]

Mitakshara law— Inheritance of share in village—Interest of son acquired on birth.

A mauza, of which the proprietary right formerly belonged to one zamindar, the ancestor of the plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government by purchase. The Government, before the birth of the plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the plaintiff's father, who thus obtained possession of a five biswas share. *Held* that, whatever interest the plaintiff, as son, might have under the Mitakshara law, in ancestral property, it could not be said that, at the time of his birth, there was any proportionate share in the mauza in which he could, by birth, acquire an interest, except this five biswas share.

In this suit the plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five biswas share only *Held* that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest.

* *Present*: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A HOBHOUSE.

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APPEAL from a decree of the High Court of the North-Western Provinces (30th April, 1878), reversing a decree of the Subordinate Judge of Mainpuri (29th September, 1877).

The question raised by this appeal related to the proportionate shares to which the parties were entitled in mauza Takha, pargana Bharthana, a village in the Etáwah district. The plaintiff-appellant alleged that the shares in the village, being ancestral and ascertainable by hereditary right, had been, during his minority, adjusted in such a way as to prevent his sharing to the full extent to which he was entitled. This had been done by his father, who was living, and the other heirs of the original zamindar, to whom, three generations back, mauza Takha had belonged. The father had, it was admitted, accepted a five biswas, or one quarter, share in the village, under a decree, made in a suit for the rectification of his share; to which decree he had consented in March, 1867. This it was alleged was the result of misrepresentation made to the father; and in so far as it diminished the son's share by hereditary right, the latter claimed to dispute it.

The defence was that the existing shares were correct, according to the revenue records relating to mauza Takha; the allotment having proceeded upon a grant by the Government, in the year 1853, made in the shares agreed to by the plaintiff's father and the other co-proprietors of the village. The Court of first instance, holding that "in no case had the father power to deprive his son of his right in hereditary property," decreed in favor of the plaintiff. This decree was reversed by a Divisional Bench of the High Court (PEARSON and TURNER, JJ.) in the following judgment (1):

"The common ancestor to the parties to this suit was Anand Singh, who had five sons—Chatar Singh, who died without issue; Darjan Singh, who died in 1823, leaving a son, Chakarpan; Sundar Singh, who died in 1826, leaving a widow, Gulab Kuar; Desraj, who died in 1852, leaving a son, Gandharap Singh; and Chatarpat, who died in 1829, leaving a widow, Sahib Kuar. Chakarpan had three sons, who are the appellants; and Gandharap

(1) The judgment is reported at p. 651, 1 All., I. L. R.

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Singh had two sons—Ujagar Singh, the respondent, and Madho Singh, who is still a minor. The estate in suit was, after Chatar Singh's death, originally recorded as held in four shares of five biswas each, held respectively by Darjan Singh, Sundar Singh, Desraj, and Chatarpat. On the death of Darjan Singh, Chakarpan was entered as the holder of his share, and after the deaths of Sundar Singh and Chatarpat, Desraj was at first recorded as the owner of their shares, but shortly afterwards the names of the widows Gulab Kuar and Sahib Kuar were entered as the holders of their husbands' shares. Again, at a later period, the names of Ajudhia Prasad and Budhu Singh, who were then aged four and two years old respectively, were substituted for those of the widows. The estate fell into arrears, and was eventually sold at auction for a balance of Government revenue, but a farm was given to Chakarpan, Ajudhia Prasad, Budhu Singh, and Desraj. In 1853 the Government, having purchased the estate at the auction-sale proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. The tahsildar reported that it appeared from the statements of Chakarpan and Gandharap Singh, son of Desraj, that the widows of Sundar Singh and Chatarpat had made a gift of their shares to Ajudhia Prasad and Budhu Singh by deeds attested by the kanungo, and the kanungo confirmed this statement. On the 2nd May, 1853, the Collector of Farukhabad inquired of Chakarpan, Gandharap, Budhu Singh, and Ajudhia Prasad in what manner they proposed to divide the estate among them if it was granted to them by the Government, and they replied that all four would hold five biswas each. The Government eventually agreed to grant the estate on condition that the arrears of revenue which had accrued when the estate was sold should be discharged. This offer was accepted, and each of the four persons above mentioned contributed his quota. On the 3rd April, 1855, the same persons appeared before the revenue officer and requested that each of them might be recorded as the owner of five biswas, and that Chakarpan and Gandharap Singh should be entered as lambardars, and Ajudhia Prasad and Budhu Singh as pattidars. It was ordered that a village administration-paper should be prepared, and in that document, which is dated the 5th April, 1855, they were entered as in possession each

of five biswas. So matters continued until 1864, when on the 15th November they agreed to the appointment of arbitrators and an umpire to divide their shares. The arbitration proceedings lasted for upwards of two years, when Gandharap Singh advanced a claim to a ten biswas share, and the arbitrators refused to proceed with their award. On the 29th March, 1867, Gandharap Singh brought a suit to obtain possession of a two and a half biswas share out of the five biswas originally held by Gulab Kuar (then deceased), and for a declaration of his right to two and half a biswas share out of the five biswas originally held by Sahib Kuar. He alleged that each of the four sons of Anand Singh had on the death of Chatar Singh obtained a five biswas share; that the widows of Sundar Singh and Chatarpat had been recorded as the holders of their respective husbands' shares to ensure their maintenance; that these ladies had in 1855 appointed Ajudhia Prasad and Budhu Singh their agents to take the account of the profit and loss on these shares, and that in the lifetime of the ladies Chakarpan wrongfully procured the substitution of his sons' names for the names of the widows. He claimed that the estate of Sundar descended on the death of his widow to Chakarpan and Desraj, and that on the death of Sahib Kuar he would become entitled to possession of one moiety of her share. On the 26th June, 1867, the parties to the suit effected a compromise, agreeing to divide the estate in four lots on the conditions set out into their petition to the Court. A decree was accordingly passed in the terms of the compromise. The respondent now sues to obtain the same relief as was sought by his father in 1867, and a declaration that the arrangement effected by the compromise and the decree are ineffectual. The respondent's father is still alive. There is this difference between the claims asserted by the respondent and his father, that the latter treated the estate as held in separate shares, the former asserts the estate remained joint until 1867. If by "joint" he means undivided there is no difference in the claim.

"The Subordinate Judge has decreed the claim. It appears to us impossible to support the decree. Assuming (which is certainly not proved) that the family remained joint until 1867, the respondent's father for all intents and purposes represented the

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interest in the estate which devolved on, and would on partition fall to, the separate share of himself and his children; and the respondent must be bound by his acts, unless he can show such fraud and collusion as would entitle him to relief on those grounds. Of this there is no evidence; on the contrary, Gandharap Singh asserted his claim, and if he forebore to press it in view of the circumstances to which we have adverted, it can hardly be doubted he prudently put an end to litigation which must have resulted in failure. There can hardly be a question that the shares of Sundar Singh and Chatarpat were entered in the names of Ajudhia Prasad and Budhu Singh, then mere children, with the consent of Desraj. Gandharap had by his declarations in 1853 and 1855 provided cogent evidence of his own acquiescence, and had this been absent, there was the difficulty in his way, that the property had been granted to Ajudhia and Budhu Singh by the Government. If, as there is strong evidence to show, the property was held in separate shares, the shares of the great uncles of the respondent descended as inheritance liable to obstruction, and he could not question his father's acts. For the reason that there is no proof of any fraud or collusion on the part of Gandharap Singh in entering into the compromise of 1867, the suit cannot be maintained. The appeal is decreed, and the suit dismissed with costs."

On this appeal,

Mr *J. F. Leith*, Q.C., and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *T. H. Cowie*, Q.C., and Mr. *H. Cowell*, for the respondents.

For the appellant it was argued that there was no sufficient evidence to show that the Government intended to grant the village in such a way that Ajudhia Prasad and Budhu Singh should be sharers. The introduction of their names into the revenue records had been brought about by Chakarpan. The latter was in a fiduciary relation to the family as manager. The shares allotted to the above-named should of right have devolved on the line to which the plaintiff belonged. To show, by analogy, that, on the restoration by the Government of an estate, joint until forfeiture, it remained

joint, when restored, reference was made to *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (1); and in regard to the rights of a son in ancestral estate under the Mitakshara law, *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2) was cited.

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This suit was brought to obtain possession of two and a half biswas of a mauza called Takha, pargana Bharthana, out of the five biswas which were said to have belonged to Gulab Kuar, deceased, the wife of Sundar Singh, and for a declaration of right in respect of two and a half biswas out of five biswas of the defendant Sahib Kuar. After the plaint was filed Sahib Kuar died, and it was amended by making it a claim for the possession of those two and a half biswas also. The property was originally that of Anand Singh, who had five sons—Chatar Singh, Darjan Singh, Sundar Singh, Desraj, and Chatarpat. Chatar Singh died without issue, and the surviving four brothers then became entitled to it in four equal shares. Each became entitled to five biswas. Darjan died in 1823, leaving a son, Chakarpan; Sundar Singh died in 1826, leaving a widow, Gulab Kuar, who died in 1860; Desraj, the third son, died in 1852, leaving a son, Gandharap Singh; and Chatarpat, the fourth surviving son, died in 1829, leaving a widow, Sahib Kuar. Chakarpan, the son of Darjan, had three sons, who are the respondents. Gandharap Singh had two sons, one being the present appellant, and the other, Madho Singh, being a minor, was not joined in the suit.

It appears that after the death of Chatar Singh the estate was recorded as being held by the four survivors, Darjan Singh, Sundar Singh, Desraj, and Chatarpat. On the death of Darjan, Chakarpan was entered as the holder of the estate, and after the death of Sundar Singh and Chatarpat, the name of Desraj appears to have been recorded. Subsequently to this the names of the widows were entered as the holders of the shares of their deceased husbands. It is said, on the part of the present appellant, the plaintiff in the suit, that this was done for the purpose only of giving them main-

(1) 12 Moo. I. A. 1.

(1) I. L. R., 5 Calc. 148; S. C., L. R. 6 Ind. App. 88.

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tenance; but whether it was so or not does not appear to their Lordships to be material. The fact is that they were entered for a time as the holders of the shares; but subsequently, in 1842, the widows being still alive, the names of Ajudhia Prasad and Budhu Singh, two of the sons of Chakarpan, appear to have been substituted for the names of the widows. It is said that in the document in which this appears there has been an interpolation, and that at the time when that document was authenticated by the acknowledgment of the parties those names were not in it. However, whether that be so or not, the estate fell into arrears, and it was sold by the Government at auction for arrears of revenue. After the sale a lease for twelve years was made of the property to Chakarpan, Desraj, Ajudhia Prasad, and Budhu Singh. Before that lease, which was made in 1844, expired, the Government appear to have come to the conclusion that it would be better to make a re-grant of the property, and certain proceedings were taken which are very material in the consideration of the case. They appear to have been begun by a proceeding of the Collector of the 14th April, 1853, in which it is stated that a letter had been received from the Commissioner of Revenue, dated the 2nd April, in reply to a previous letter of the Collector, together with a letter of the Secretary of the Board of Revenue, dated 22nd March, 1853, containing a direction that "The Collector should submit a special report of this village,"—therein called Takha, pargana Sakatpur Ayrwa,—"stating full particulars in regard thereof, in order that Government orders may be obtained in behalf of the former zamindar. A full report should be submitted. It should contain other accounts of the settlement, such as what sum has fallen due as arrears, and in what years. It should likewise state whether the zamindars agree to take the property on the condition of paying the sum of Rs. 3,810 or more—whatever sum might be considered proper to be taken from them, and nothing should be left out." The Collector made an order that a parwana should be issued to the tahsildar, directing him to furnish a report "stating what persons are heirs of Desraj, the deceased farmer and former zamindar, and how are Ajudhia Prasad and other farmers related to Chakarpan and Desraj, former zamindars." The parwana was issued, and is dated the 21st April, 1853, and upon that the tahsildar made his report, dated the 27th April,

1853, in which he says: "In reply to the parwana, dated 21st April, 1853, No. 271, I beg to say that, from an inspection of the khewat for 1249 fasli, it appears that, in respect of the zamindari of this village, the names of Chakarpan and Desraj are entered as lambardars, and those of the wives of Sundar Singh and Chatarpat are entered as pattidars. It appeared from the statement of the kanungo of the mahál that Sundar Singh and Chatarpat were real brothers of Desraj and the real paternal uncles of Chakarpan. After the death of Sundar Singh and Chatarpat the names of their wives were entered in the khewat; and afterwards this village was, on account of revenue arrears, sold by auction, and purchased by the Government." This their Lordships find was correct. "No one had any proprietary right left therein excepting the Government. But, at the time of the revised settlement, the settlement officer, in consideration of the rights of the former zamindars, farmed out the village to them, and the names of the said Desraj and Chakarpan, and those of Ajudhia Prasad and Budhu Singh, sons of Chakarpan, were entered." Then comes what is most material: "The reason of the names of Ajudhia Prasad and Budhu Singh being entered,"—showing that at that time the names were actually entered, because he says he had inspected the khewat,—"appeared from the statements of Chakarpan and Gandharap Singh, son of Desraj, to be this, that the wives of Sundar Singh and Chatarpat made a gift of their shares to Ajudhia Prasad and Budhu Singh, and, having executed the deeds of gift, got them witnessed by the kanungo of the mahál. This was also corroborated by the statement of the kanungo. Chakarpan stated that the deeds of gift, &c., were filed in the Revenue Court. Desraj has no other son but Gandharap Singh, nor any other heir; nay, ere this, after the death of Desraj, the name of Gandharap Singh, has been entered in place of Desraj, deceased. Ajudhia Prasad and Budhu Singh are the sons of Chakarpan, and are grandsons to Desraj in point of relationship. I have sent Chakarpan, Ajudhia Prasad, Budhu Singh, and Gandharap Singh, the four farmers under a separate chalán, to you, with Jalab-ud-din"—a peon; showing that he did not, as was suggested in the argument, make this report merely upon an inspection of records, but that he had the parties before him,—including Gandharap, the plaintiff's

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father,—and that he also gave to the person to whom he made the report the means of examining them himself. Upon this report proceedings appear to have been taken by the Government. On the 8th July, 1853, a letter was sent by the Secretary to the Board of Revenue, by whose direction these proceedings were taken, to the Secretary to the Government, saying: "I am directed by the Sudder Board of Revenue to request that you will submit for the consideration and orders of the Hon'ble the Lieutenant-Governor the accompanying file of correspondence regarding mauza Takha, the property of Government." It is to be observed that the Government treats it as at that time absolutely its property, and which it could deal with as it thought fit. The letter states the reasons why the Government thinks that the re-grant should be made;—that the village broke down in consequence of the famine, and the revenue was not properly paid. It continues: "Chakarpan, the farmer who has continued till the present time in occupation, is the ex-zamindar, and, in consideration of his having failed only on account of the assets being inadequate to the demand, it is proposed to restore the proprietary right to him on condition that he pay up Rs. 3,810-2-6, the amount of balances which accrued under his own management, and not under kham tahsil. These are detailed in the margin. The Board of Revenue are of opinion that a good case is made out for the old proprietors, and they recommend that the proposed measure may receive His Honor's sanction, subject to the conditions that, preliminary to reinstatement, a full and complete compact for future management be executed and recorded." Upon that there is a letter from the Officiating Assistant Secretary to Government, dated the 22nd July, 1853, in which he says: "I have the honor to acknowledge the receipt of your letter No. 353, dated the 8th instant, with its enclosures, and am directed by the Hon'ble the Lieutenant-Governor to inform you in reply that he has been pleased to confer the proprietary right in mauza Takha, a Government estate in pargana Sakatpur, zila Farukhabad, on Chakarpan, the farmer and ex-zamindar, on the conditions proposed by the Board."

It is clear that Chakarpan, where he is spoken of as the ex-zamindar, was not intended by the Government to be the only person

who was to have the benefit of the grant. This, indeed, has not been suggested. He was to have it for the persons who are spoken of as the old proprietors. Then who were the persons that the Government considered to be the old proprietors? They had in the report which was before them, and upon which they acted, a statement that the old proprietors and the persons who had been in possession under the lease were Chakarpan, Gandharap Singh, Ajudhia Prasad, and Budhu Singh; and the only construction that can be put upon these letters, which are in fact the grant by the Government, is that the intention was that the Government, being, by reason of the sale for arrears of revenue, the absolute owner of the property, and so considering itself, resolved to make a grant to them in four shares.

What took place subsequently is this: On the 5th April, 1855, two years afterwards, Chakarpan and Gandharap Singh, the father of the plaintiff, and Ajudhia Prasad and Budhu Singh, appeared, and caused to be recorded what is called a village administration paper, in which it is stated that they were entitled to this property in the shares of five biswas each. It appears that on the 3rd April, two days previously, an inquiry was made, in which Chakarpan and Gandharap Singh stated that, at the time of the settlement, they were the two lambardars, and that it was arranged that they should continue to be appointed lambardars, and that Ajudhia Prasad and Budhu Singh should remain pattidars. The patwari was examined, and he stated that the shares which they had stated were correct,—the shares of five biswas each,—and he went on to say: "All the four persons are in possession as usual, and, besides these four shares, there is no other co-partner and co-sharer." There is evidence, therefore, that the possession followed the grant by the Government, and was in accordance with the view which their Lordships take of it. That possession appears to have continued without any dispute, as far as their Lordships can see, down to November, 1864, when the parties made an agreement for an arbitration for making a partition. After that had been proceeded with some little way, Gandharap Singh set up a claim to five biswas, in addition to the five of which he had been in possession. His claim was that the property was the family property, and that upon the death of the widows he became entitled to half of the share of

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each of them. In consequence of this, the arbitrators refused to proceed. They considered, and properly, that they had no authority to try such a question, and the arbitration came to an end. Then, in 1867, Gandharap brought a suit claiming the five biswas, which was compromised, and the present plaintiff has brought a similar suit, claiming to be entitled not only to the share of the five biswas which clearly belonged to his father Gandharap, but to the other five biswas, and to set aside the compromise. The suit by Gandharap did not proceed to trial, but he agreed to a decree by which he acknowledged that he was entitled only to the five biswas. He did, however, obtain by the compromise a decree for partition, but their Lordships consider that it is not necessary for them to give any opinion as to the effect of the compromise upon the right of the present plaintiff. He, at the time of the grant by the Government, was not living; he was not born until the 24th February, 1855, and, whatever rights he may have under the Mitakshara law to ancestral property, it cannot be said that at the time of his birth there was any ancestral property of which he could acquire a share except the five biswas. The grant being, in their Lordships' opinion, a grant by the Government—which, as has been said, had the absolute power to dispose of the property in any way it thought fit—only of five biswas, that was all the interest which Gandharap Singh had, and his son could not acquire a share in any other. It has been said that Gandharap was imposed upon; that he was led by the false representations of Chakarpan to assent to the entry of the names of the two sons of Chakarpan, and to allow it to appear to the Government that they were proprietors. Supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be,—whether it could be enforced by a suit or by a representation to the Government,—it does not come within the rules of the Mitakshara law which gives a son, upon his birth, a share in the ancestral estate of his father.

Their Lordships, therefore, will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the High Court, and the appellant will pay the costs of the appeal.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondents: Messrs *W. M.* and *A. Ranken Ford.*

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APPELLATE CIVIL.

1881 *July* 29.

Before Mr. Justice Straight and Mr. Justice Duthoit.

BENI PRASAD (DEFENDANT) *v.* LACHMAN PRASAD (PLAINTIFF).*

Obstruction to execution of decree for land—Act VIII of 1859 *(Civil Procedure Code), ss.* 226, 229, 231—*Fresh suit.*

The holder of a decree for land, having been resisted in obtaining possession thereof by a person other than the defendant, claiming to be in possession of such land on his own account, complained under Act VIII of 1859 of such resistance to the Court executing the decree. The Court rejected such application on the ground that it had been made after the time limited by law. *Held* that the order rejecting such application could not be regarded as one under s. 229 of Act VIII of 1859, which would under s. 231 preclude such decree-holder from instituting a suit against such person for such land.

THE plaintiff in this suit, Lachman Prasad, and one Mohesh Prasad obtained a decree against one Sheoambar Singh for possession of a certain share of a certain village on the 28th July, 1868. The decree-holders applied in execution of this decree for possession of the sír-land appertaining to such share. Sheoambar Singh objected to the quantity of land claimed by the decree-holders, but his objections were disallowed, and the decree-holders were declared by the Court executing the decree entitled to 61 bighas 4 biswas of sír-land. They obtained possession of 10 bighas of such land, and in 1871 applied for delivery of possession of the remainder. The amin deputed to deliver possession was resisted by Raghobar Singh and Sitla Bakhsh, defendants in this suit, who claimed a two-thirds share of such sír-land. This resistance took place on the 13th December, 1871. The decree-holders thereupon, on the 29th January, 1872, applied to the Court executing the decree under s. 226 of Act VIII of 1859. On that same day the Court executing the decree made an order directing

* Second Appeal, No. 5 of 1881, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 25th September, 1880, affirming a decree of Babu Pramoda Charan Banarji, Munsif of Allahabad, dated the 30th June, 1880.

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that the 4th May, 1872, should be fixed for the hearing of the case; that the decree-holders should produce evidence on that date; and that notice should be issued to the persons offering obstruction to the execution of the decree to appear personally or by pleader, and produce evidence in support of their claim. Notice was accordingly issued to Raghobar Singh and Sitla Bakhsh, and they appeared and filed written grounds in support of their claim. They also contended that the application could not be entertained having been preferred more than one month after their resistance to the execution of the decree, the time limited by s. 226 of Act VIII of 1859. The Court executing the decree, on the 12th July, 1872, without going into the merits of the case, dismissed the application on the ground that it had been preferred beyond time. Mohesh Prasad subsequently sold his moiety of the zamindari share in question, and it was acquired by Beni Prasad, a defendant in this suit, by right of pre-emption. In 1879 Lachman Prasad again applied for delivery of possession of the remaining sir-land. The Court executing the decree disallowed this application, holding that he could not obtain possession of such land in execution of the decree, but must bring a suit for possession of it. Lachman Prasad accordingly, on the 4th March, 1880, brought the present suit against Raghobar Singh, Sitla Bakhsh, and Beni Prasad for possession of a moiety of such land, the last named person being made a defendant on the ground that he had refused to join in the suit. The defendants Raghobar Singh and Sitla Bakhsh set up as a defence to the suit that they were not in possession of the land in dispute, their rights having been transferred to the defendant Beni Prasad under an execution-sale. Beni Prasad set up as a defence, *inter alia*, that the suit should not be entertained, as the decision of the Court executing the decree, dated the 12th July, 1872, made under s. 229 of Act VIII of 1859, was under s. 231 of the same Act a bar to the institution of a fresh suit in respect of the same matter. The Court of first instance disallowed this defence, observing as follows: "It is contended on behalf of the defendant that, as the application made by the plaintiff in the execution-department under s. 226 of Act VIII of 1859 was rejected, he is precluded from instituting a regular suit in regard to the same matter: this contention would have been valid, had

the application made by the plaintiff in the execution-case been entertained under s. 229 of Act VIII of 1859, and decided against him; but it is admitted that the said application was not entertained and registered as a regular suit, under the provisions of s. 229, but was rejected on the ground that it had been presented after the period of thirty days prescribed by s. 226: the provisions of s. 226 are permissive, and if the plaintiff did not chose to proceed under that section, or if his application was not heard under s. 229, there is nothing to bar a regular suit, as the persons he sues are not those against whom he had obtained his decree, but are third parties." On appeal by Beni Prasad the lower appellate Court affirmed the decision of the Court of first instance. On second appeal to the High Court the defendant Beni Prasad again contended that the plaintiff was precluded from bringing a fresh suit by the provisions of s. 231 of Act VIII of 1859.

Mr. *Howard*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The judgment of the Court (STRAIGHT, J. and DUTHOIT, J.) was delivered by

STRAIGHT, J.—The only plea seriously urged by the learned counsel for the appellant is the first taken in the memorandum of appeal and that has no force. We cannot regard the order of the 12th July, 1872, as passed under s 229 of Act VIII of 1859, for it in no way dealt with the merits of the rights of the parties, but was simply a rejection of the application on the ground that it had not been preferred within the period mentioned in s. 226. All that was ever decided against the respondent was, that he had come too late to be able to take advantage of the cheaper and more summary procedure provided by s. 229; and it would be as inequitable as absurd to hold that the determination of such a question of limitation, relating solely to the admissibility of the application, concludes all other matters between the parties and prohibits the present suit. (The remaining portion of the judgment is not material for the purposes of this report).

1881
August 4.

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

QUTUB HUSAIN AND ANOTHER (DEFENDANTS) *v.* ABUL HASAN (PLAINTIFF).*

Payment of revenue by a person for another—Suit for reimbursement—Small Cause Court suit.

A suit by the proprietor of one village who has been compelled to pay the revenue payable by the proprietor of another village for reimbursement is, where the amount of such payment does not exceed Rs. 500, a suit of the nature cognizable in a Mufassal Court of Small Causes. *Nath Prasad* v. *Baij Nath* followed (1).

THE parties to this suit were co-sharers in a village called Baripur Sakha. The defendants were the sole proprietors of a village called Bhikpur. By a mistake on the part of the revenue authorities the revenue assessed on Bhikpur, amounting to Rs. 530, was recorded as the revenue payable by Baripur Sakha; and that assessed on Baripur Sakha, amounting to Rs. 260, as the revenue payable by Bhikpur. The plaintiff, as a co-sharer in Baripur Sakha, was in consequence compelled to pay revenue which was properly payable by the defendants as the proprietors of Bhikpur. He accordingly brought the present suit against the defendants in the Munsif's Court to recover the sum he had so paid, amounting to Rs. 101 odd. The Court of first instance gave the plaintiff a decree for a portion of the sum claimed by him, holding, as to the remainder, that the suit was barred by limitation. On appeal by the plaintiff the lower appellate Court held that no part of the claim was barred by limitation.

The defendants appealed to the High Court against this decision. On behalf of the plaintiff it was objected that a second appeal in the case would not lie, as the suit was of the nature cognizable in a Court of Small Causes.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

Pandit *Bishambar Nath*, for the respondent.

* Second Appeal, No. 204 of 1881, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 4th December, 1880, modifying a decree of Babu Pramoda Charan Banerji, Munsif of Allahabad, dated the 19th July, 1880.

(1) I. L. R., 3 All. 66.

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QUTUB HUSAIN v. ABUL HASAN.

The High Court (OLDFIELD, J. and DUTHOIT, J.) delivered the following judgment:—

OLDFIELD, J.—The objection taken by the respondent is valid, as under the decision of the Full Bench in *Nath Prasad* v. *Baij Nath* (1) the suit is one of the nature of a Small Cause suit in which no appeal lies to this Court. Under the circumstances of the case we make no order as to costs, and dismiss the appeal.

Appeal dismissed.

CIVIL JURISDICTION.

1881 *August* 18.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIRA LAL (PLAINTIFF) v. DATADIN (DEFENDANT.)*

Debt—Promissory note—Written acknowledgment of debt—Oral acknowledgment—Evidence of debt—Act I of 1872 (*Evidence Act*), *s.* 91.

H lent Rs. 85 to *D* on a pledge of moveable property. *D* repaid *H* Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt, Rs. 45, was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance, and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for Rs. 45, and the property was returned to him. *H* subsequently sued *D* on such oral acknowledgment for Rs. 45, ignoring the promissory note, which being insufficiently stamped was not admissible in evidence, *Held* that the existence of the promissory note did not debar *H* from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt.

THIS was a reference to the High Court under s. 617 of Act X of 1877, by Mr. R. D. Alexander, Judge of the Court of Small Causes at Allahabad. The point on which the Small Cause Court Judge entertained doubt appears from the following statement of the facts drawn up by him:—

"The plaintiff's suit is based on an alleged admission by the defendant of Rs. 45 being due as the balance of a debt on the morning of the 23rd July, 1880. The facts as alleged for the plaintiff are as follows. Prior to the 23rd July, 1880, the plaintiff lent the defendant Rs. 85 on the security of some jewels depo-

* Reference, No. 106B of 1881, under s. 617 of Act X of 1877 by R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 19th July, 1881.

(1) I. L. R., 3 All. 66.

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sited with him by the latter. On the 23rd July the defendant is said to have paid Rs 40 and admitted Rs. 45 as due in the morning, and it appears to have been arranged then that the defendant should give a promissory note for that amount and retire the jewels. Accordingly in the evening of that day he brought the promissory note and received back the jewels. The plaintiff has now sued on the verbal admission, ignoring the promissory note, which being insufficiently stamped is not admissible in evidence. The question to be decided is, if taking into consideration the provisions of s. 91, Indian Evidence Act, the plaintiff can give any evidence of the defendant's admission but the promissory note. Had the suit been based on the simple fact of a balance of Rs. 45 being due on a debt of Rs. 85 originally, I think that perhaps plaintiff could ignore the promissory note and sue for the consideration, but as he has based his suit on the verbal admission of the defendant, which verbal admission was subsequently embodied in the promissory note, I am doubtful if, under the circumstances, and having regard to the remarks of Spankie, J., in *Benarsi Das* v. *Bikhari Das* (1) in revision under s. 622, Act X of 1877 (a copy of the judgment of the High Court in which is filed in this Court's records), he can recover under the facts as stated. Spankie, J., said: "But if a contract is contained in a bill of exchange, a negotiable instrument, the bill itself must be proved. This written instrument, according to Taylor (6th ed., vol. 1, p. 405), is to be regarded in some measure as the ultimate fact to be proved, and in all cases of written contracts the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement." If then the admission of the defendant must be looked upon as evidenced by the promissory note and it alone, the plaintiff's suit must fail. As I feel great doubts whether the promissory note is the only evidence the plaintiff is competent to offer, although inclining to the belief that such is the case, I refer this question for the decision of the Honorable the High Court, *viz.*, whether under the facts as stated the plaintiff can maintain this suit?"

The *Senior Government Pleader* (Lala *Juala Prasad*), for the plaintiff.

(1) I. L. R., 3 All 717.

Munshi *Sukh Ram*, for the defendant.

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The opinion of the High Court (OLDFIELD, J., and STRAIGHT, J.,) was as follows:—

STRAIGHT, J.—The existence of the promissory note does not debar the plaintiff from resorting to his original consideration. Nor does the circumstance that there is a written admission of the debt exclude evidence of an oral admission. Under this condition of things, unless barred by limitation, the plaintiff is entitled to recover.

APPELLATE CIVIL.

1881 *August* 26

Before Mr. Justice Oldfield and Mr. Justice Duthoit.

KISHEN SAHAI (JUDGMENT-DEBTOR) *v* THE COLLECTOR OF ALLAHABAD, AS MANAGER OF THE COURT OF WARDS, ON BEHALF OF PARTAB CHAND, MINOR (DECREE-HOLDER).*

Appeal by some only and not all of the defendants—Execution of decree—Amendment of decree—Review of judgment—Act IX of 1871 (*Limitation Act*), *sch. ii, No.* 167.

On the 27th July, 1864, a District Court gave the plaintiff in a suit a decree against all the defendants including *B*. All the defendants appealed to the Sudder Court from such decree except *B*. The Sudder Court on the 6th March, 1865, set aside such decree and dismissed the suit. The plaintiff appealed to Her Majesty in Council from the Sudder Court's decree, all the defendants except *B* being respondents to this appeal. Her Majesty in Council, on the 17th March, 1869, made a decree reversing the Sudder Court's decree and restoring that of the District Court. On the 9th October, 1869, the plaintiff applied for execution of the District Court's decree, and such decree was under execution up to July 1872. On the 9th October 1874, the plaintiff applied for amendment of such decree in certain respects, it being incapable of execution in those respects. *B* was a party to this proceeding. On the 16th August, 1876, such decree was amended; and the plaintiff subsequently applied for its execution as amended against all the defendants. *Held* that, notwithstanding *B* was not a party to the appeals to the Sudder Court and Her Majesty in Council, such decree was a valid decree and capable of execution against him. Also that the application of the 9th October, 1869, was within time, computing from the date of the decree of Her Majesty in Council—*Chedoo Lal* v. *Nund Coomar Lal* (1) Also that the application to amend such decree, being substantially one for review of judgment, gave under art 167, sch. ii of Act IX of 1871, a period from which limitation would run in respect of the subsequent application for execution which was therefore within time.

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* First Appeal, No. 2 of 1881, from an order of W. Tyrrell, Esq. Judge of Allahabad, dated the 2nd October, 1880.

(1) 6 W. R., Misc., 60.

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KISHEN SAHAI v. THE COLLECTOR OF ALLAHABAD.

MANICK CHAND, the proprietor of a twelve-anna share of a village called Bela Sailabi, situate in pargana Jhusi, zila Allahabad, on the east or the left bank of the Ganges, brought a suit against the proprietors, seventy-four in number, of three villages situate in pargana Chail, zila Allahabad, on the west or the right bank of the Ganges, for possession of certain alluvial land, and Rs. 5,062-15-1 mesne profits. This suit was tried by the District Judge of Allahabad, who, on the 27th July, 1864, gave the plaintiff a decree in these terms: "Decree for plaintiff with costs in full with interest at twelve per cent. per annum: P.S. Mesne profits according to the tahsil and Collector's accounts will go with the decree." All the defendants, with the exception of one, Baki Lal, appealed from this decree to the Sudder Court, which, on the 6th March, 1865, reversed the decision of the District Judge, decreed the appeal, and dismissed the plaintiff's suit, with one set of costs in both Courts. The plaintiff appealed from the decree of the Sudder Court to Her Majesty in Council, making all the defendants, excepting Baki Lal, respondents to his appeal. On the 17th March, 1869, Her Majesty in Council reversed the decree of the Sudder Court, and in lieu thereof made a decree dismissing the appeal to that Court from the decree of the District Judge, dated the 27th July, 1864, with costs. On the 9th October, 1869, Manick Chand applied for execution of the decree of the District Judge against all the defendants. On the 7th March, 1870, the District Judge held, as regards mesne profits, that, as the decree could not be considered a joint decree, the defendants not having been sued as jointly liable, and as it did not specify the liability of each defendant, it was not capable of execution. As regards possession of the land in question, the District Judge ordered execution to issue. The decree-holder appealed to the High Court, which, on the 4th August, 1870, affirmed the District Judge's decision regarding the mesne profits, observing that the decree-holder should move the Court which gave him the decree to set it right. On the 2nd December, 1870, the District Judge, taking the High Court to mean by its decision of the 4th August, 1870, that the decree was not capable of execution in any respect, made an order directing that all such steps as had been taken in execution should be considered void. The decree-holder appealed from this order to the

High Court, which, on the 9th February, 1871, pointing out that the District Judge had misapprehended the purport of its order of the 4th August, 1870, which referred to that portion only of the decree relating to mesne profits, and was not intended to refer to all the proceedings in execution, directed him to dispose of so much of the application for execution as was not affected by that order. On the 4th June, 1871, the District Judge directed that possession should be delivered to the decree-holder; and on the 10th July, 1872, the execution-proceedings were struck off the file of pending cases. On the 9th October, 1874, the decree-holder applied for amendment of the decree, making Baki Lal a party to such application; and on the 16th August, 1876, the decree was amended by making the several defendants severally liable for mesne profits and specifying their liabilities. The Court of Wards having subsequently applied for execution of the decree, on behalf of the minor son of Manick Chand, who had meanwhile died, Kishen Sahai, the representative of Baki Lal, objected, *inter alia*, that, inasmuch as the decree had been set aside by the Sudder Court, and Baki Lal had not been a party to the proceedings before Her Majesty in Council when it was restored, the decree did not exist so far as he was concerned; and that execution of the decree was barred by limitation. The District Judge disallowed these objections; whereupon Kishen Sahai appealed to the High Court, raising the same contention as he had raised in the lower Court.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The judgment of the Court (OLDFIELD, J., and DUTHOIT, J.) was delivered by

OLDFIELD, J.—The respondent is holder of a decree passed in 1864 for possession of certain property and mesne profits against several defendants, amongst whom was Baki Lal, now represented by the appellant. The defendants with the exception of Baki Lal appealed to the Sudder Court, and that Court dismissed the suit on the 6th March, 1865. The plaintiff then appealed to Her Majesty in Council, and all the defendants, except Baki Lal, were parties to

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that appeal, and on the 17th March, 1869, the decree of the Court of first instance was restored by the order of Her Majesty in Council. The decree-holder on the 9th October, 1869, applied to the Court of first instance for execution against all the defendants. He was put in possession of the property decreed, but the decree was held by the Judge to be incapable of execution as to the matter of mesne profits owing to vagueness. The High Court on an appeal refused to interfere with the Judge's order, who thereupon on the 2nd December, 1870, held that all his previous orders in execution were void. The decree-holder again went up to the High Court in appeal, and that Court directed the Judge to execute the decree so far as to put the decree-holder in possession, and suggested that the decree should be amended in respect of other matters on which it was vague and incapable of execution. On the 4th June, 1871, the Judge ordered possession to be given to the decree-holder, and on the 10th July, 1872, the case was struck off the execution-file. On the 9th October, 1874, the decree-holder applied for amendment of the decree, making Baki Lal a party to the proceedings, and on the 16th August, 1876, the decree was amended by making the several defendants separately liable and specifying their liabilities. The decree-holder has again sought execution of the decree as amended; and the appellant before us, who represents Baki Lal, contends that there is no decree which can be executed against him; that the execution is barred by limitation; and that he is not liable under the decree to future mesne profits and interest on mesne profits.

It appears to us that the decree is capable of execution and is not barred by limitation. Assuming that, in consequence of Baki Lal being no party to the appeal to the Sudder Court and Her Majesty in Council, those proceedings do not affect him, yet the original decree of the Judge, which was ultimately restored by the order of Her Majesty in Council and amended by the Court that passed it, is a valid decree against him, and capable of execution, and it cannot be held to have ever become barred by limitation. The application dated the 9th October, 1869, was within time from the date of the decision of Her Majesty in Council on appeal [*Chedoo Lal* v. *Nund Coomar Lal* (1)]. Proceedings to enforce the

(1) 6 W. R. Misc. 60.

decree were taken up to 1872, and then on the 9th October, 1874, an application to amend the decree was made. We consider that the proceedings under this application were substantially of the nature of a review of judgment, and will, under art. 167, sch. ii of Act IX of 1871, at the time in force, give a period from which limitation will run in respect of the subsequent application for execution which will therefore be within time. In execution of the decree we are not in a position to go behind the proceedings in review so as to question their validity: the decree as amended is binding on the appellant. So far then the appellant's objections fail, nor is the objection to the future mesne profits valid, as we consider that the decree which is in execution awards them. The decree is, however, silent as to interest on mesne profits, and we so far amend the Judge's order that we direct him to take a fresh account excluding interest on mesne profits and pass orders accordingly. Costs of the parties will be borne proportionately in both Courts to amount awarded.

Cause remanded.

APPELLATE CRIMINAL.

1879
August 28.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* BERRILL.

European British subject—Jurisdiction—Act X of 1872 (Criminal Procedure Code), ss. 74, 83.

B, who was charged before a Magistrate, who was competent to inquire into a complaint against a European British subject, with an offence triable by him, claimed to be dealt with as a European British subject. *B* did not state the grounds of such claim. The Magistrate did not decide whether *B* was or was not a European British subject, but proceeded with the case, dealing with him as if he were not a European British subject, and sentencing him to rigorous imprisonment for one year and to a fine. On appeal by *B* the High Court remanded the case to the Magistrate in order that he might decide, in the manner directed by s. 83 of the Criminal Procedure Code, whether *B* was or was not a European British subject.

The Magistrate having decided that *B* was a European British subject, *held* that, this being so, and it appearing that the Magistrate had dealt with *B* as other than a European British subject, *B's* trial was void for want of jurisdiction. Also that, the Magistrate having tried the case without jurisdiction, the High Court could not proceed with *B's* appeal on the merits, with a view, in the event

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of its deciding that the offence of which *B* was charged had been established, to the reduction of the sentence passed upon him by the Magistrate to one which he was competent to pass under s. 74 of the Criminal Procedure Code.

ROBERT BERRILL was on the 19th March, 1879, convicted by Lieutenant-Colonel W. Tweedie, Political Agent at Gwalior, of an offence under s. 163 of the Indian Penal Code, and sentenced to rigorous imprisonment for one year, and to a fine of Rs 1,000, or in default to rigorous imprisonment for a further term of six months. He appealed to the High Court from such conviction and sentence. The grounds of appeal were (i) that, the appellant having pleaded during the course of his trial that he was a European British subject, the Political Agent was bound to take evidence and come to some decision on the point of his nationality, and his judgment and order were, in default of such a finding, defective and illegal; (ii) that the Political Agent acted wrongly in not allowing the appellant time in which to establish his plea that he was a European British subject; (iii) that the finding of the Political Agent was against the weight of evidence and opposed to all the facts and circumstances proved in the case; and (iv) that in any event the sentence passed by the Political Agent was illegal, as he was not competent to pass a sentence of one year's rigorous imprisonment on a European British subject. In support of his contention that he was a European British subject, the appellant filed affidavits by persons acquainted with him and his family.

Messrs. *Colvin* and *Spankie*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The High Court (STUART, C. J., and OLDFIELD, J.), by an order dated the 21st May, 1879, remanded the case to the Political Agent, in order that he might determine the question whether the appellant was or was not a European British subject in the manner directed by s. 83 of the Criminal Procedure Code. That order was as follows:—

STUART, C. J.—In this case it is pleaded, among other things, that the appellant, Robert Berrill, is a European British subject. The record, however, is not in such a state as to enable us at present to

determine the course it is proper for us to adopt, and we must remand the case for a proper inquiry and finding on the subject as directed by s. 83 of the Criminal Procedure Code, Act X of 1872. Neither the appellant nor the Political Agent, who as Magistrate tried the accused, appear to have complied with the provisions of the law on this point. By s. 83 it is provided that, "when any person claims to be dealt with as a European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial, and such Magistrate shall on such statement decide whether he is or is not a European British subject, and shall deal with him accordingly." The directions here are very precise; the person claiming to be a European British subject shall state the grounds of his claim, and on such statement and grounds the Magistrate is to decide the question. In the present case there is a memorandum by the Magistrate that the "accused pleads through his counsel that he is a European British subject and claims to be tried as such," and the plea is repeated now before us, and several affidavits in support of it have been filed, which, however, we cannot at present consider. But there is no statement of the grounds on which he made that claim, nor does the omission appear to have attracted the notice of the Magistrate, for he has recorded no order or finding on the subject, and he appears to have proceeded with and concluded the trial without regard to the plea. We, therefore, remand the case to the Magistrate with directions to consider and decide this question in the manner directed by s. 83 of the Criminal Procedure Code, and to return the record to this Court with his finding on that question with all convenient speed. It is alleged before us that the accused has been prejudiced as to procuring evidence to support his plea that he is a European British subject by the order of the 24th February last, whereby he was directed not to leave Morar, although he had been duly admitted to bail. We in consequence direct that the accused be allowed all legal facilities for obtaining evidence, and that he remain on the same bail till the further orders of the Court.

The Political Agent found upon evidence adduced that the appellant was a European British subject within the meaning of s. 71

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of the Criminal Procedure Code, and returned the case to the High Court.

Messrs. *Colvin* and *Spankie*, for the appellant.

Mr. *Ross* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The Court (STUART, C. J., and OLDFIELD, J.), delivered the following judgment:—

STUART, C. J.—The Magistrate has now made a return to our order dated the 21st May last, and has found that the accused, Robert Berrill, is entitled to be considered and dealt with as a European British subject. This being so, we must hold that the trial held and the conviction and sentence passed by the Magistrate, Lieutenant-Colonel Tweedie, Political Agent of Gwalior, are void for want of jurisdiction. It appears from the record, and it is not disputed, that the Magistrate tried the accused as being other than a European British subject. Indeed the record shows that the Magistrate's attention was directed to this question, but without determining it he proceeded with and concluded the trial by convicting Berrill and sentencing him to a punishment which, as Berrill being a European British subject, he had no right to award. We notice this sentence, however, as affording the measure in the Magistrate's mind of Berrill's guilt; and it is therefore evident on the showing of the Magistrate himself that he had no jurisdiction to try the accused as a European British subject, but that he should have at once proceeded under s. 75 of the Criminal Procedure Code and committed Berrill for trial to the Court of Session or to the Court with the powers of a Court of Session in Gwalior.

We are asked by the counsel for the prosecution to hear and determine the appeal on the merits of the case, at least so far as these affect the sentence, with the suggestion that the prosecutor would be satisfied with imprisonment of the accused for a period not exceeding three months or a fine up to Rs. 1,000 or both, a sentence which would in effect cover the jurisdiction of the Magistrate and *pro tanto* legalize his proceedings. But we cannot adopt that view. The Magistrate in our opinion has tried the case without jurisdiction, and we must, therefore, set aside what he has done

and remit the record to him for disposal of the case according to law. And in doing so he must proceed *de novo* and not make any use of or reference to the proceedings which we set aside.

We must therefore quash, and we hereby quash, the conviction and sentence by the Magistrate, and direct that he on the accused being brought before him do proceed according to the law laid down in the Criminal Procedure Code respecting the trial of European British subjects, and on this subject the Magistrate's attention is directed to ss. 74 and 75. We order that the accused Robert Berrill do within eight days from the date of this judgment appear before the Magistrate at Gwalior and surrender to his bail.

APPELLATE CIVIL.

1881 *August* 31.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HABIB-UL-LAH AND ANOTHER (DEFENDANTS) *v.* ACHAIBAR PANDEY (PLAINTIFF).*

Pre-emption—Joint purchase—Suit against one of the purchasers—Addition of other purchaser as defendant—Effect of suit as regards the latter being barred by limitation—Act XV. of 1877 (*Limitation Act*), *s.* 22.

P, on the 12th April, 1880, instituted a suit against *Z* claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother *A* jointly, under an instrument dated the 12th April, 1879. On the 3rd May, 1880, *A* was made a defendant to such suit, *Z* being appointed guardian for the suit for him.

Held that, inasmuch as such suit, as regards *A*, was beyond time, and as the only relief which could be granted therein to *P* was the invalidation of the joint sale to *Z* and *A*, such suit, even admitting it was within time as regards *Z*, was not maintainable.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of the sale of a three-pie share of an undivided village called Pipri Buzurg. This share had been purchased, as appeared from the instrument of sale, which was registered on the 12th April, 1879, by the defendant Zaka-ul-lah jointly for himself and as guardian of his minor brother, Ata-ul-lah. The suit was

* Second Appeal, No. 123 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 20th November, 1880, affirming a decree of Rai Izzat Rai, Munsif of Bansi, dated the 10th June, 1880.

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instituted on the 12th April, 1880, and was originally instituted against the defendant Zaka-ul-lah alone. On the 3rd May, 1880, Ata-ullah was made a defendant to the suit, Zaka-ul-lah being appointed guardian for the suit for him. Both the lower Courts gave the plaintiff a decree.

In second appeal by the defendants it was contended that the suit was not maintainable as it had not been instituted against both the defendants within the period limited by law, that is to say, one year from the date of registration of the instrument of sale.

Messrs. *Siraj-ud-din* and *Simeon* and Maulvi *Mehdi Hasan*, for the appellant.

The respondent did not appear.

The judgment of the Court (STRAIGHT, J., and BRODHURST, J.,) was delivered by

STRAIGHT, J.—The contract of sale, which the plaintiff-respondent seeks to impeach, was a joint and indivisible purchase of the three-pie share in suit by the defendant-appellant, Zaka-ul-lah, for himself and as guardian of his brother, Ata-ul-lah, the other defendant. The suit as originally brought was unmaintainable, for no relief could have been given against one of the vendees alone, so as to affect the joint interests of his co-vendee, or to establish the plaintiff-respondent's right by pre-emption to supersede the sale as a whole. According to the limitation law the date from which Ata-ul-lah should be considered a party to the litigation is 3rd May, 1880, for he was then joined as a defendant. But the sale-deed was registered on the 12th April, 1879, more than one year before. Even if it be conceded that the suit was in time as against Zaka-ul-lah, which we do not admit, it was clearly too late in respect of Ata-ul-lah, and as the only relief that could be granted to the plaintiff-respondent was to be obtained through the invalidation of the joint contract, it follows that his claim could not be sustained unless preferred within the proper period of limitation against both the vendees. The appeal must be decreed with costs, the decisions of the lower Courts reversed, and the suit dismissed.

Appeal allowed.

APPELLATE CRIMINAL.

1881
October 26.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* MURARI.

Joinder of charges—Offences of the same kind committed in respect of different persons—Act X of 1872 (Criminal Procedure Code), ss. 452, 453.

M was accused of cheating *G* on two different occasions and also of cheating *K* on a third occasion. The three offences were committed within one year of each other; and *M* was charged and tried at the same time for the three offences. *Held* that such joinder of charges was irregular, inasmuch as the combination of three offences of the same kind, for the purpose of one trial, can only be, where such offences have been committed in respect of one and the same person, and not against different prosecutors, within the period of one year, as provided in the Criminal Procedure Code.

MURARI was tried by Mr. R. S. Aikman, Magistrate of the first class, at one and the same time on the following charges under s. 417 of the Penal Code, *viz.*, (i) that he, on or about the 22rd day of April, 1880, at Agra, by pledging a box as containing ornaments of the value of Rs. 140, knowing the same to contain only mud, cheated one Khunni Lal; (ii) that he, on or about the 5th day of August, 1880, at Agra, by pledging a box as containing gold ornaments, knowing the same to contain only pieces of stone, cheated one Giasi; and (iii) that he, on or about the 11th day of August, 1880, at Agra, by pledging a box as containing gold ornaments, knowing the same to contain only pieces of stone, cheated the said Giasi. He was convicted by the Magistrate on all three charges. It appeared that criminal proceedings against Murari were instituted on the complaint of Giasi. The offence he had committed in respect of Khunni Lal came to light in the course of the police inquiry which followed on that complaint; and proceedings in respect of that offence were commenced on the police report. On appeal by Murari the Sessions Judge set aside the conviction in respect of the offence against Khunni Lal on the ground, amongst others, that Khunni Lal had not made a complaint, but had merely been a witness for the prosecution in the case of Giasi. The Local Government appealed to the High Court, contending that the police report gave the Magistrate jurisdiction in the matter of the offence against Khunni Lal, and a complaint was not necessary.

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EMPRESS OF INDIA v. MURARI.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Local Government.

The respondent was not represented.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—It was perfectly competent for the Magistrate to prefer the charge in respect of Khunni without any formal complaint being made, and he rightly did so. But he was in error in disposing of it in one and the same trial with the case in which Giasi was the prosecutor. The combination of three offences of the same kind, for the purpose of one trial, can only be, where they have been committed in respect of one and the same person, and not against different prosecutors, within the period of twelve months, as provided by the Criminal Procedure Code. As the trial of Murari for the offence against Khunni was therefore in our opinion irregularly held, we shall not disturb the Judge's order; nor do we think it necessary to direct any further proceedings on that charge. Looking at the evidence, it is obvious that the convict is a very dangerous and mischievous person, and fully deserves the measure of punishment inflicted upon him by the Magistrate. We therefore direct that upon each of the convictions for cheating Giasi, which must be recorded under s. 420, Indian Penal Code, the sentence upon Murari be enhanced to eighteen months rigorous imprisonment, or three years in all. The fines are hereby remitted.

1881 *November* 12.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* GAYADIN AND ANOTHER.

Appeal by Local Government from judgment of acquittal—Act X of 1872 (*Criminal Procedure Code*), *s* 272.

It is not because a Judge or a Magistrate has taken a view of a case in which the Local Government does not coincide, and has acquitted accused persons, that an appeal by the Local Government must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by s 272 of the Criminal Procedure Code. The doing so should be limited to those instances, in which the lower Court has so obstinately blundered and gone wrong, as to produce a result mischievous at once to the administration of justice and the interests of the public.

Held, therefore, the Local Government having appealed from an original judgment of acquittal of a Sessions Judge, that, as such judgment was an honest and not unreasonable one, of which the facts of the case were susceptible, such appeal should be dismissed.

THIS was an appeal by the Local Government from a judgment of acquittal of Mr. J. H. Prinsep, Sessions Judge of Cawnpore, dated the 1st April, 1881. Madari, Gayadin, Bhagwandin, Binda, and Mangli were jointly tried by the Sessions Judge on a charge of murder. The Sessions Judge convicted all the accused persons on such charge, with the exception of Gayadin and Binda, whom he acquitted thereon. The present appeal was from the Sessions Judge's judgment acquitting Gayadin and Binda. The grounds of appeal were (i) that the acquittal of Gayadin and Binda was against the evidence in the case, and (ii) that the evidence in the case proved that Gayadin and Binda were guilty of the offence charged against them.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Local Government.

Mr. *Dillon*, for the respondents.

The judgment of the High Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—We do not feel called upon in this case to interfere with the decision of the Sessions Judge acquitting the two respondents, Gayadin and Binda. We are not prepared to say that, had it been our task to try them, as well as the persons who have been convicted, we might not have taken a view of their conduct similar to that expressed by our late colleague Mr. Justice Spankie in his judgment in the appeal of Madari and the others. But it does not appear to us that this is quite the test to be applied in determining this appeal by Government from the acquittal of Gayadin and Binda. On the contrary, we think it would be an inaccurate and inappropriate one. The powers given to the Local Government by s. 272 of the Criminal Procedure Code are of an exceptional and unusual character; and while we fully recognise the necessity for their existence in this country, we are equally clear that they should be most sparingly enforced; and, in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or

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perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by s. 272. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public. We cannot say in the present case that the Sessions Judge so egregiously and foolishly erred in his conclusions, as to the respondents Gayadin and Binda, that we feel ourselves bound either to convict those two persons, or to order a new trial. He had the witnesses before him, and consequently the best opportunity of judging their truth, and he appears to have conducted the inquiry with care and patience, and to have weighed and considered the facts to the best of his ability. It may be, as we have already remarked, that we might have arrived at a view other than that formed by him, but holding his decision to be an honest and not unreasonable one, of which the facts were susceptible, we unhesitatingly dismiss this appeal.

Appeal dismissed.

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December 7.

CRIMINAL JURISDICTION.

Before Mr. Justice Brodhurst.

EMPRESS OF INDIA *v.* JANGBIR.

Commitment on a charge of adultery—Withdrawal of prosecution—Discharge of accused—Act X of 1872 (*Criminal Procedure Code*), *ss.* 196, 197, *Explanation.*

A Magistrate, having committed a person for trial by the Court of Session on a charge of adultery, immediately afterwards, on the representation of the prosecutor that he wished to withdraw from the prosecution, discharged the accused. *Held* that the order of discharge was bad, as under ss 196 and 197, Explanation, Criminal Procedure Code, a commitment once made can be quashed by the High Court only.

THIS was a case reported to the High Court for orders by Mr. F. H. Fisher, Officiating Sessions Judge of Saháranpur, under s. 296 of the Criminal Procedure Code. It appeared that Jangbir

had been charged before Mr. F. Giles, Assistant Superintendent of Dehra Dun, and Magistrate of the first class, by one Naqar with having committed adultery with his wife. The Magistrate inquired into the charge, and committed the accused for trial before the Sessions Judge of Saháranpur, by an order dated the 14th October, 1881. By a letter dated the 7th November, 1881, the Magistrate informed the Sessions Judge of such commitment. On this latter date the Magistrate recorded a statement made by Naqar, the complainant, to the effect that he had arranged matters with the accused and no longer desired to prosecute him. On the same date the Magistrate recorded a proceeding, stating that Naqar had withdrawn from the prosecution, and that the accused was discharged, which he submitted with Naqar's statement to the Sessions Judge. In reporting the case to the High Court the Sessions Judge observed as follows: "It appears to me that, in recording such a proceeding and discharging the accused, Mr. Giles has acted in contravention of s. 197 (Criminal Procedure Code), Explanation: his proceeding amounts in effect to a setting aside of the commitment already made: I am in doubt whether to regard the order of the 7th November, 1881, as a nullity, and proceed to fix a date for the trial to take place, or to refer the matter to the High Court: if I followed the former course, there would be this inconvenience, that the accused has been discharged without bail or any recognizance taken for his appearance: under all the circumstances it seems to me that the proper course will be to refer the matter to the High Court under s. 296 for orders, and I do so accordingly."

The High Court made the following order:—

BRODHURST, J.—This reference has been made by the Officiating Sessions Judge of Saháranpur, under s. 296, Criminal Procedure Code, and under the following circumstances. One Naqar, a sipahi of the 2nd Gurkha Regiment at Dehra, charged Jangbir, who is also a sipahi in the same regiment, with having, on or about the 1st September, 1881, committed adultery with his Naqar's wife. The charge was inquired into by the Assistant Superintendent of Dehra Dún who, on the 14th October, committed the accused for trial, under s. 497 of the Indian Penal Code.

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The Assistant Superintendent did not, however, inform the Sessions Judge of this commitment until the 7th November, and he, on the very same day, recorded the following statement of Naqar: "I have come to an agreement with Jangbir Thappa, and I do not wish to pursue my complaint against him: I have received Rs. 130 from him, and I withdraw my prosecution." On the same date, *viz.*, the 7th November, the Assistant Superintendent recorded this order: "The complainant Naqar has now withdrawn his charge of adultery against Jangbir Thappa under which the latter was committed for trial before the Court of Session: his statement with this order is submitted to the Sessions Judge, and Jangbir Thappa is discharged." The offence of adultery may, as shown in *Illustration* (*d.*), s. 214, Indian Penal Code, be compounded; and had the complainant made the above mentioned statement before the Magistrate prior to commitment, the Magistrate might have allowed him to withdraw from the prosecution; but the Magistrate's order of the 7th November last was illegal, for "a commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law."—*Vide* Explanation, s. 197, Criminal Procedure Code. The order of the Assistant Superintendent of the 7th November, 1881, discharging the accused Jangbir Thappa is therefore set aside, and the case will be heard by the Sessions Judge, who, after recording the evidence of the complainant Naqar, will take whatever further proceedings may then appear to him to be called for.

CIVIL JURISDICTION.

1881 *December 7.*

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

IN THE MATTER OF THE PETITION OF ALI MAZHAR *v.* GOPI NATH AND ANOTHER.

Relations resembling contract—Act IX of 1872 (*Contract Act*), *ss.* 69, 70—*Payment of land-revenue—Small Cause Court suit—Act XI of* 1865, *s.* 6.

The plaintiffs purchased land belonging to the defendant at an execution-sale, at which it was notified that arrears of revenue were due in respect of the land. The plaintiffs paid such arrears, and also the arrears which had accrued

* Application, No. 73 of 1881, for revision under s. 622 of Act X of 1877 of a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 3rd March, 1881, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 16th December, 1880.

in the period between the sale and the date the plaintiffs obtained possession. They then sued the defendant in the Munsif's Court to recover the amount they had paid. *Held* that, with reference to the principle laid down in *Nath Prasad* v. *Baij Nath* (1), the suit should have been instituted in the Court of Small Causes.

THE plaintiffs in this suit, on the 20th November, 1877, purchased certain land belonging to the defendant at an execution-sale. At the time of such sale it was notified that there were certain arrears of revenue due to Government in respect of such land. On the 19th February, 1878, the plaintiffs paid such arrears, and also the revenue which had become due in respect of such land between the date of such sale and the date on which they obtained possession of such land; and on the 28th February, 1878, they obtained possession of such land. They subsequently brought the present suit against the defendant in the Court of the Munsif of Allahabad, in which they claimed to recover from him what they had so paid, amounting, principal with interest, to Rs. 66-12-0. The Munsif gave the plaintiffs a decree; which on appeal by the defendant the District Court affirmed. The defendant thereupon applied to the High Court to set aside the decrees of the lower Courts, under s. 622 of Act X. of 1877, on the ground that they had no jurisdiction to entertain the suit, as it was cognizable in the Court of Small Causes at Allahabad.

Babu *Ram Das*, for the defendant.

Pandit *Bishambhar Nath* and Munshi *Hanuman Prasad*, for the plaintiffs.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—It is admitted by the respondents' pleader, and rightly, that, with reference to the principle laid down in the Full Bench decision of this Court in *Nath Prasad* v. *Baij Nath* (1), this suit should have been instituted in the Court of Small Causes. We therefore set aside the proceedings of the Courts below, and direct the plaint to be returned to the plaintiffs for presentation in the proper Court. Each party will pay their own costs in all Courts.

Application allowed.

(1) I. L. R. 3 All. 66.

1881
December 7.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

IN THE MATTER OF THE PETITION OF DURGA PRASAD *v* SHEO CHARAN LAL AND OTHERS.*

High Court, powers of revision under s. 622 of Act X of 1877 (Civil Procedure Code)—Delay in moving Court.

Where an auction-purchaser applied to the High Court to set aside, in the exercise of its powers under s. 622 of the Civil Procedure Code, an order setting aside a sale of immoveable property in execution of a decree, on the ground that such order was illegal, such application being made nearly seventeen months after the date of such order, the Court, having regard to the time that had elapsed before such application was made, refused to interfere.

THE Munsif of Akbarpur, zila Cawnpore, by an order dated the 1st December, 1879, set aside a sale of immoveable property in execution of a decree on the ground that, when such property was put up for sale, only one person, Durga Prasad by name, bid for it, and it was knocked down to him; and neither the decree-holder nor the people of the neighbourhood were present at such sale, and in consequence a very inadequate price had been realized. On the 22nd April, 1881, Durga Prasad, the auction-purchaser, applied to the High Court to set aside the Munsif's order, in the exercise of its powers of revision under s. 622, Act X of 1877, on the ground that the Munsif was not competent to set aside such sale, as there had been no irregularity in its publication or conduct, and in setting it aside for inadequacy of price the Munsif had acted *ultra vires.*

Pandit *Nand Lal*, for the auction-purchaser.

Munshi *Hanuman Prasad*, for the decree-holder and the judgment-debtor.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—The applicant did not move the Court for nearly seventeen months after the order complained of was passed, and under all the circumstances we decline to interfere under s. 622 of the Code of Civil Procedure. The application is dismissed with costs.

Application rejected.

* Application, No. 51 of 1881, for revision under s. 622 of Act X of 1877 of an order of Maulvi Sakhawat Ali, Munsif of Akbarpur, zila Cawnpore, dated the 1st December, 1879.

APPELLATE CIVIL.

1881
December 10.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BAL CHAND AND ANOTHER (JUDGMENT-DEBTORS) *v.* RAGHUNATH DAS AND ANOTHER (DECREE-HOLDERS.)*

Execution of decree—Act X of 1877 (*Civil Procedure Code*), *s.* 230.

The parties to a decree presented a petition to the Court executing the decree stating that it had been agreed between them that the amount of the decree should be paid by ten-monthly instalments of Rs. 500 each. The Court made an order directing that such petition should be filed. *Held* that this order did not amount to one directing payment of money to be made at a certain date, which would give a fresh period of limitation under s. 230 (*b*) of the Civil Procedure Code.

THE decree of which execution was sought in this case was one for money, and had been made on the 6th January, 1869. On the 20th June, 1870, the parties to the decree, having agreed that its amount should be paid by instalments of Rs. 500, payable every ten months, and that, in the event of default in the payment of any one instalment, the whole decree should be executed, preferred a petition to the Subordinate Judge of Benares, the Court executing the decree, to that effect. The Subordinate Judge made an order on this petition that it should be filed. The decree-holders, having made an application for execution of the decree under s. 230 of Act X of 1877, which was granted, subsequently made the present application for execution on the 7th March, 1881. The judgment-debtors contended that under the provisions of s. 230 of Act X of 1877 this application should not be granted, as more than twelve years from the date of the decree had expired. The decree-holders contended, with reference to clause (*b*) of that section, that the period of twelve years should be computed from the 20th April, 1871, the date of the default in payment of the first instalment payable under the arrangement of the 20th June, 1870. The Subordinate Judge allowed this contention, observing as follows:—"S. 230 of Act X of 1877 provides that, where the decree or any subsequent order directs the payment of money on any specified date, the period is to be reckoned from the date of default: in this case a private adjustment took place, and the judgment-debtor on the

* First Appeal, No. 97 of 1881, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 2nd June, 1881.

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20th June, 1870, filed an agreement for payment of the decree by ten monthly instalments of Rs. 500 each with interest at eight annas per cent., and verified the same: it was stipulated that, if the judgment-debtor failed to pay any one instalment, the decree-holder should be at liberty to realize the whole amount of the decree, without waiting for the expiry of the remaining instalments: the Court passed no particular order, though the parties were deemed to be bound by the arrangement: under these circumstances the period is to be calculated from the date of default in payment of instalments, and not from the date of the decree: I am therefore of opinion that the twelve years limitation does not bar the present application."

The judgment-debtors appealed to the High Court, contending that the lower Court had misconstrued the provisions of s. 230 of Act X of 1877, and execution of the decree was barred by limitation.

Messrs. *Conlan* and *Saunders*, for the appellant.

Shaikh *Maula Bakhsh*, for the respondent.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—This is an appeal from an order granting an application to execute a decree; and it is contended in appeal that the execution of the decree has become barred under the provisions of s. 230, Act X of 1877. The contention is valid. The decree is dated the 6th January, 1869, and the present application is dated the 7th March, 1881. Application for execution has previously been made under s. 230 and granted; and this application has been made more than twelve years from the dates mentioned in (*a*) and (*b*) of s. 230, and execution has in consequence become barred under the provisions of that section.

It appears that the parties on the 20th July, 1870, filed a petition to the effect that they had agreed that the amount of the decree should be satisfied by instalments, and the Court ordered the petition to be filed; but this order does not amount, as has been contended, to an order directing payment of money to be

made on a certain date, which will give a fresh period from which the limitation of twelve years will run under (*b*), s. 230. The appeal is decreed, and the order of the lower Court is reversed with costs.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

1881 *December* 13.

LACHMAN PRASAD (PLAINTIFF) *v.* BAL SINGH (DEFENDANT).*

Occupancy-tenant—Continuous occupation—Act XVIII of 1873 (*N.-W. P. Rent Act*), *s.* 8.

A tenant who has occupied or cultivated alluvial land, whenever such land was capable of occupation or cultivation, for twelve years, acquires by such occupation or cultivation a right of occupancy in such land.

THE plaintiff in this suit sued in the Court of the Munsif of Allahabad for possession of certain land on the allegation that it was land, originally waste, but lately reclaimed, belonging to the village of which he was the lessee, and the defendant had taken forcible possession thereof and cultivated it in 1287 fasli. The defendant set up as a defence to the suit that he had for upwards of twelve years past cultivated the land, and had cultivated it in the year in question as a tenant with a right of occupancy. It appeared that the land was "*kachár*" land of the Ganges, and that for eighteen years or so the defendant had cultivated it whenever the action of the Ganges allowed him to do so. For three agricultural years, *viz.*, for 1284, 1285, and 1286, the defendant had not been able to cultivate it, as it was covered with sand; and on its becoming culturable and his cultivating it after that period in 1287 fasli the plaintiff, the lessee of the village to which the land belonged, regarding him as a trespasser, had brought the present suit against him. The Munsif dismissed the suit. On appeal by the plaintiff the Judge of the Court of Small Causes, in the exercise of the powers of a Subordinate Judge, affirmed the decree of the Court of first instance. The Judge observed as follows: "There is evidence on the record which shows that the defendant has for many years held land in the '*kachár*' or alluvial mahál of this village: this kind of land is cultivated when-

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* Second Appeal, No. 334 of 1881, from a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 24th December, 1880, affirming a decree of Babu Pramoda Charan Banarji, Munsif of Allahabad, dated the 3rd May, 1880.

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over nature allows it to be cultivated; and it would appear that for eighteen or twenty years the defendant was in the habit of cultivating those particular fields, when the action of the river allowed him to. The former lessee of the village deposes that the defendant used regularly to cultivate these lands and pay him rent for them; and it appears that it was on the new lessee the plaintiff taking this village that this dispute arose; for three years the defendant could not cultivate the land, and on his cultivating it in 1287 fasli the plaintiff looked upon his action as something new and as that of a trespasser, but it appears to me that his previous cultivation must be taken into account, and that it was such as to give him a right of occupancy in these lands, and that he was entitled to hold on in 1287 fasli, and that the plantiff could not treat him as a trespasser."

In second appeal the plaintiff contended that the cultivation of the land by the defendant, not being continuous, did not give him a right of occupancy.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

The following judgments were delivered by the Court:—

STUART, C. J.—The lower appellate Court states that it does not understand the Munsif's reasons for holding that the defendant-respondent had acquired rights of occupancy in the disputed lands, and I must allow that I am in the same difficulty. But the Subordinate Judge himself states that the kind of land in suit is cultivated whenever nature allows it to be cultivated, that is, whenever the submerging water dries up and leaves it open for the time at least to a cultivating process. The lower appellate Court finds that, for eighteen or twenty years, the defendant-respondent was in the habit of cultivating these particular fields when the action of the river allowed such cultivation; and it further finds on the evidence that the defendant-respondent's cultivation was in fact such as to give him a right of occupancy in the lands.

The only question requiring consideration is whether the kind of possession and cultivation had by the defendant in the lands was such as come within the meaning of s. 8 of the Rent Act XVIII

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of 1873. By that section it is provided that: "Every tenant who has actually occupied or cultivated land continuously for twelve years has a right of occupancy in the land so occupied or cultivated by him." Here the cultivation was not actually and absolutely continuous, but it was as continuous as the nature of the case admitted of, and it was besides cultivation against which necessarily there could not have existed any adverse right of a similar kind. The occupancy or cultivation therefore by the respondent of the lands in question was in my judgment such as to give him a claim to be an occupancy-tenant within the meaning of the Rent Law; for, as I have shown, the Subordinate Judge has found that these lands were cultivated by the defendant for eighteen or twenty years. His findings go to negative the contention of the plaintiff-appellant; and following a ruling by Pearson, J., and myself in First Appeal No. 125 of 1879, dated the 4th August, 1880 (1), I must hold that the defendant could not be ejected from or dispossessed of his holding otherwise than as provided by s. 34 (*b*) and s. 35 of the Rent Act XVIII of 1873. It is not pretended that there is any ground for holding that these sections of the Rent Act have any application to the present case. This appeal altogether fails, and it is dismissed with costs.

BRODHURST, J.—As the lower Courts have found that the defendant-respondent had acquired a right of occupancy in the lands in suit, and as the latter person had neither relinquished those lands nor been ejected from them, under cl. (*b*), s. 34 of Act XVIII of 1873, I concur with the Hon'ble the Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

CIVIL JURISDICTION.

1881 *December* 13.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

IN THE MATTER OF THE PETITION OF JAUNDHA KUAR *v.* THE COURT OF WARDS.

Lunatic—Natives of India—Act XXXV of 1858, *s.* 23—*High Court's Charter, s.* 12 —*Original jurisdiction of High Court in respect of the persons and estates of lunatics who are natives of India.*

The High Court has not, under s. 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India.

(1) Not reported.

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THIS was an application to the High Court by Jaundha Kuar, the wife of one Gauri Shankar Prasad, a lunatic, to appoint her guardian of her husband's person and estate in the exercise of the powers conferred on it by s. 12 of its Charter. Gauri Shankar Prasad had been adjudicated a lunatic by the District Court of Allahabad under Act XXXV of 1858, and Narain Kuar, the widow of the lunatic's paternal uncle, had been appointed guardian of his person, and one Dalthaman Singh, the brother's son of Narain Kuar, was appointed manager of his estate. On the death of Dalthaman Singh, in June, 1880, the District Court appointed his brother, Sarju Prasad, manager. On the death of Narain Kuar in October, 1880, Jaundha Kuar applied to the District Court to be appointed guardian of the lunatic's person. The District Court, by an order dated the 19th November, 1880, rejected this application, and directed the Collector of the Allahabad District to take charge of the lunatic's estate. Jaundha Kuar appealed to the High Court from this order. This appeal came for hearing before Stuart, C. J., and Duthoit, J., who ordered that it should be struck off the file, and directed the appellant to prefer a petition, if so advised, praying that under s. 12 of the High Court's Charter she might be appointed guardian of the lunatic with power to nominate the manager of his estate. Thereupon Jaundha Kuar presented the present petition to the High Court, praying that, for the reasons stated therein (which, for the purposes of this report, it is not material to state), it would, under s. 12 of its Charter, appoint her guardian of the lunatic's person and estate, with power to appoint Sarju Prasad manager. The preliminary question raised by this application was as to the original jurisdiction of the High Court in respect of the persons and estates of lunatics who are natives of India.

Messrs. *Conlan* and *Colvin* and Pandit *Bishambhar Nath*, for the petitioner.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the Court of Wards.

The following judgments were delivered by the Court:

STUART, C. J.—This is an application on behalf of the wife of Babu Gauri Shankar Prasad, a lunatic, and it prays that she be

appointed guardian of the lunatic's person and estate. The matter came originally before a Bench of this Court consisting of Duthoit, J., and myself, in the form of an appeal to us from the order of the Judge of Allahabad, whereby the Court of Wards was authorized and requested to take charge of the property of the lunatic, and to appoint a proper guardian of his person. In that appeal no appearance was made for the respondent, but the appellant was represented by two learned advocates of this Court, Messrs. Conlan and Colvin. The learned counsel argued against the order of the Judge, but they contended at the same time that we had jurisdiction to entertain an application and make an order for the appointment of a guardian, not merely in the way of appeal from the order of the District Judge, but in virtue of the powers conferred on us by s. 12 of our Charter, which is in these terms: "And we do further ordain that the said High Court of Judicature for the North-Western Provinces shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the North-Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force." It was thus clear that whatever powers in such a case as the present the High Court of Calcutta has, as successor of the old Supreme Court, we have equally in these Provinces. And we thought it better that the very important question which had been raised ought to be considered in the form suggested by the learned counsel, with whatever result. We therefore considered it unnecessary to make any order in the appeal, and we at the same time informed the learned counsel that it would be open to them to make any further application to this Court they might think proper. Hence the present application, which is based on the assumption of original jurisdiction in this Court to entertain and make an order upon it under s. 12 of our Charter.

At the hearing Mr. Conlan repeated and enforced the arguments he had used in the appeal before Duthoit, J., and myself. Juala Prasad, the Senior Government Pleader, for the respondent, contended that this Court has no original jurisdiction in such cases,

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and that the powers conferred on us by s. 12 of our Charter, whatever they might be in other respects, are expressly qualified by that section itself as "subject to the provisions of any laws or regulations now in force," and that Act XXXV of 1858 was such a law; and he pointed out that by s. 23 of this Act the expression "Civil Court" was declared to mean "the principal Court of original jurisdiction in the district,' and that such principal Civil Court was not this High Court, but the Court of the District Judge of Allahabad.

We took time to consider our judgment, and meanwhile I directed the Registrar of this Court to write to the Registrar on the original side of the Calcutta Court for the purpose of ascertaining what was the practice of that Court in such cases. From the information thus obtained it would appear that the powers exercised in matters of lunacy by that Court, as the successor and inheritor of the powers of the old Supreme Court, are, as regards natives of India, only exercised within the limits of the town of Calcutta itself, and that in other respects the procedure directed by Act XXXIV of 1858 is followed throughout Lower Bengal.

After a careful examination of the Charter of the old Supreme Court, of that of its successor, the present High Court of Calcutta, and of the Charter of this Court, I have come to the conclusion that the practice of the Calcutta Court is correct, and that the effect of it is to exclude any original jurisdiction in matters of lunacy on the part of this Court, and that the present application must therefore be refused.

Act XXXIV of 1858 clearly applies only to the Courts of Judicature in India then established by Royal Charter, while this High Court was not established till 1866. I must at the same time allow that the terms of s. 12 of our Charter are wide enough to admit of the argument submitted to us on behalf of the applicant, giving, as they appear to do, not merely appellate jurisdiction, but "the like power and authority" which is exercised by the High Court of Calcutta, or in other words, as it was maintained, all the power and all the authority wherever exercised by that Court. In this case, however, it appears to me impossible to get over the effect of

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the provisions of Act XXXV of 1858, and, with the light derived from the practice of the Calcutta Court under Act XXXIV of 1858, no doubt is left on my mind that, whatever our powers may be by appeal or otherwise, we have no jurisdiction to entertain the present application, which must therefore be dismissed, but, under the circumstances, without costs.

Of course I need say nothing at present respecting our jurisdiction over the persons and estates of lunatics who are European British subjects. The application which we have now dismissed relates only to the person and property of a lunatic who is a native of India.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing, without costs, the present application on the ground that we have no jurisdiction to entertain it.

Application dismissed.

APPELLATE CIVIL.

1881 *December* 14.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KALIAN SINGH (PLAINTIFF) *v.* GUR DAYAL (DEFENDANT).*

Pre-emption—Misjoinder—Irregularity not affecting merits or jurisdiction—Act X of 1877 (*Civil Procedure Code*), *ss.* 45,578.

The sons of *R* and of *K* and of *S* possessed proprietary rights in two mahâls of a certain mauza. *P* possessed proprietary rights in one of those mahâls. In April, 1879, the sons of *R* sold their proprietary rights in both mahâls to *G*. In August, 1879, the sons of *K* sold their proprietary rights in both mahâls to *G*. Later in the same month the sons of *S* sold their proprietary rights in both mahâls to *N*. *G* sued *N* to enforce a right of pre-emption in respect of the sale to the latter, and obtained a decree. *P* then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the mahâl of which he was a co-sharer, joining as defendants *G* and *N* and the vendors to them. *G* alone objected in the Court of first instance to the frame of the suit. That Court overruled the objection and gave *P* a decree. The lower appellate Court reversed this decree on the ground of misjoinder.

Held that in respect of *G* there was no misjoinder, but that in respect of the other defendants there was misjoinder of both causes of action and parties.

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* Second Appeal, No. 375 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 11th January, 1881, reversing a decree of Maulvi Maksud Ali, Subordinate Judge of Moradabad, dated the 9th July, 1880.

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Inasmuch as, however, G alone objected to the frame of the suit, and the defect did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court ought not, regard being had to s. 578 of Act X of 1877, to have reversed the decree of the Court of first instance by reason of such defect.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad* and *Pandit Bishambhar Nath*, for the respondent.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—It appears that in mauza Mohanpur there are three mahâls. In one mahâl, Kishore Singh-wala, the sons of Ram Bakhsh Singh, and the sons of Kishan Singh, and the sons of Kishore Singh, are share-holders. In the second mahâl, Parmeshri Singh-wala, the same persons hold shares, together with the plaintiff, who has one-half. On the 15th April, 1879, the sons of Ram Bakhsh Singh sold their interests in the two mahâls to Gur Dayal Mal, one of the defendants. On the 3rd August, 1879, the sons of Kishan Singh sold their interests in the same mahâls to Gur Dayal Mal; and on the 23rd August, 1879, the sons of Kishore Singh sold their interests in the two mahâls to Niada Mal and Sewa Ram. After Gur Dayal Mal had made the purchases by which he became a sharer in the mahâls, he brought a suit for pre-emption against Niada Mal and Sewa Ram in respect of the subject of the third sale, and got a decree. The plaintiff, who is a sharer in mahâl Parmeshri Singh-wala, has brought this suit against Gur Dayal Mal, Niada Mal, Sewa Ram, and the vendors to them, claiming the interests sold in mahâl Parmeshri Singh-wala, under all these sales, by right of pre-emption. The Court of first instance decreed the claim on its merits. The Judge has reversed the decree, and dismissed it on the sole ground of misjoinder. It is contended in appeal that there is no misjoinder with reference to the provisions of s. 45, Civil Procedure Code, which permits a plaintiff to unite several causes of action against the same defendants in the same suit; and, so far as the defendant Gur Dayal Mal is concerned, the

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contention may be accepted, but the section will not apply to the other defendants; the causes of action do not apply alike to those defendants; each sale gives a distinct and separate cause o action against different defendants, and so there is no case of uniting causes of action against the same defendants, such as s. 45 contemplates. There is, therefore, misjoinder of causes of action and parties; but none of the defendants, with the exception of Gur Dayal Mal, took the objection; and we have not been shown that the defect has affected the merits of the case or the jurisdiction of the Court, and we therefore allow the second ground of appeal under s. 578, Civil Procedure Code, and reverse the decree of the lower appellate Court, and remand the appeal for disposal on the merits: costs to follow the result.

Cause remanded.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

1881 *December* 15.

KEDAR NATH AND ANOTHER (PLAINTIFFS) v. DEBI DIN (DEFENDANT).*

Suit on behalf of minor—Permission to relative to sue—Act XL of 1858, *s.* 3.

The mother of a minor, who had not obtained a certificate under Act XL of 1858, instituted a suit on behalf of the minor for some property of small value. She did not ask the Court in which she instituted the suit for permission to institute it, as required by s. 3 of that Act, but the Court entertained it, the defendant not raising the objection that it had been instituted without permission, and it was decided on the merits in favour of the minor. *Held* that, under these circumstances, it must be taken, notwithstanding there was no order allowing the mother to sue, that the suit was instituted with the Court's permission.

THIS was a suit instituted on behalf of two minors by their mother. The plaintiffs claimed, as the sons and heirs to one Ram Charan, deceased, possession of certain land belonging to him, valued at Rs. 204, and the cancelment of a deed of sale of such land in favour of the defendant, bearing date the 6th January, 1880, and purporting to be executed by Ram Charan. They alleged that such deed of sale was fabricated. The defendant set up as a defence to the suit that the plaintiffs were the illegitimate sons of Ram Charan, and had therefore no right to the land in suit; and that the deed of sale in question was a genuine instrument. The Court

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* Second Appeal, No. 406 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 11th January, 1831, reversing a decree of Maulvi Abdul Haq, Munsif of Kanauj, dated the 30th September, 1880.

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of first instance found that the plaintiffs were the legitimate sons of Ram Charan and entitled to such land as his heirs, and that the deed of sale was a forgery, and gave the plaintiffs a decree as claimed. The defendant appealed, urging that the suit had been improperly instituted on behalf of the plaintiffs, as their mother did not hold a certificate of guardianship under Act XL of 1858, and had not obtained permission to institute it on their behalf. The lower appellate Court allowed this objection, observing as follows: "The mother has no certificate of guardianship: the suit was instituted under s. 440 of Act X of 1877; but the Court holds that section did not repeal s. 3 of Act XL of 1858: under that section no person can institute a suit connected with an estate of which he claims the charge, until he shall have obtained a certificate: the mother of the minors had no certificate: the section goes on to say that, where the property is of small value, or for other sufficient reason, the Court having jurisdiction may allow any relative of a minor to institute a suit, although a certificate of administration has not been granted: the present suit must be held to have been instituted under the last quoted part of the section; but it does not appear that the mother of the minors ever applied to the Court for leave to represent the minors in the suit: the lower Court has a discretion to exercise, and an appeal will lie from a wrong exercise of that discretion; but there is nothing on the record to show that the discretion has been exercised at all: the fact that the lower Court admitted and heard the suit cannot be held as tantamount to its having exercised its discretion: Ch. 31 of the Civil Procedure Code does not, the Court holds, cancel s. 3 of Act XL of 1858: on a suit being instituted by a minor, one of two procedures are necessary: either on application made the Court will allow the next friend of the minor to institute the suit, the Court exercising its discretion under s. 3 of Act XL of 1858; or should the suit have been instituted, it will postpone it until a certificate of guardianship has been granted: was there anything in the record to show that the lower Court had exercised its discretion under s. 3 of Act XL of 1858, no objection could be taken on the score that it is taken: as it is, the Court must allow the objection." The lower appellate Court accordingly dismissed the suit.

The plaintiffs appealed to the High Court, contending that, inasmuch as the Court of first instance had allowed the suit to be instituted on their behalf by their mother, and the defendant had suffered it to be determined without objection, the lower appellate Court had wrongly found that the suit had been instituted without permission; and that, assuming that there was an irregularity in the institution of the suit, as such irregularity did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court had acted contrary to the provisions of s. 578 of Act X of 1877, in reversing the decree of the Court of first instance on the ground of such irregularity.

Lala *Harkishen Das*, Munshi *Kashi Prasad*, and Babu *Lal Chand*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STUART, C. J., and BRODHURST, J.) was delivered by

STUART, C. J.—The Judge is of course right in holding that Act X of 1877 has not repealed s. 3 of Act XL of 858; but he has misread and misapplied the *proviso* to that section, which is in these terms: "Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf, although a certificate of administration has not been granted to such relative." This enactment clearly applies to the present case. The property is undoubtedly of small value, the cause of action being a sale-deed, the consideration for which was only Rs 99, and it must be allowed that the mother was a very proper "relative" to institute the suit in behalf of her sons, the minors. No doubt no order was made expressly allowing the suit to be so conducted, but it was in fact so conducted without any objection on the part of the defendant, and with the manifest sanction of the Munsif, who entertained the suit in the form in which it was brought, and in that form too decided it on its merits. This state of things, in our opinion, shows a sufficient compliance with the proviso, although no doubt it would have been better if an order allowing the mother to sue had been recorded. To hold, however,

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that the want of such an order on the record is a fatal defect is, in our judgment, a mistaken view of the law. We therefore allow the present appeal with costs, set aside the order of the Judge, and remand the case to him for disposal on the merits. The costs of this remand will abide the result.

Cause remanded.

1881 December 16

Before Mr. Justice Oldfield and Mr Justice Brodhurst

KESRI AND ANOTHER (PLAINTIFFS) v. GANGA PRASAD AND ANOTHER (DEFENDANTS).*

Vendor and purchaser—Contract of sale—Purchase money.

The vendees of certain land, a portion of which only was in their possession by virtue of the sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held* that, inasmuch as the sale to them had taken effect, they were entitled, notwithstanding the whole of the purchase money might not have been paid, to a decree as claimed, and the vendors if they had any claim in respect of the purchase-money, should be left to seek their remedy.

THE plaintiffs in this suit claimed a declaration of their proprietary right to 260 bighas of land and the cancelment of a deed of sale dated the 20th September, 1875. They claimed by virtue of a deed of sale dated the 13th July, 1868. It appeared that one Sundar had given the plaintiffs a usufructuary mortgage of a part of the 260 bighas of land in suit, putting them in possession of such part. He subsequently sold the 260 bighas to the plaintiffs for Rs. 800, the deed of sale being dated the 13th July, 1868. At this time the plaintiffs were in possession of the portion mortgaged to them; the rest of the 260 bighas being in the possession of other mortgagees. The heirs of Sundar, Ganga Prasad and Dirag Singh, subsequently sold 159 bighas to Gokul Singh and Kesri Singh, defendants in this suit, for Rs 300, the deed of sale being dated the 20th September, 1875. The plaintiffs brought the present suit against the heirs of Sundar and Gokul Singh and Kesri Singh for a declaration of their proprietary right to the

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* Second Appeal, No 441 of 1881, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 10th January, 1881, modifying a decree of Sayyid Zain-ul-abdin, Munsif of Sheokohabad, dated the 16th September, 1880.

260 bighas under the deed of the 13th July, 1868, and to have the deed of the 20th September, 1875, cancelled. At the time the suit was brought the land which had not been mortgaged to the plaintiffs was still in the possession of other mortgagees. The defendants set up as a defence to the suit, *inter alia*, that the plaintiffs had not paid the consideration-money for the sale to them, and in consequence such sale had not taken effect. The Court of first instance framed as one of the issues for trial the issue: "Is the plaintiffs' deed of sale without any consideration?" The Court held that the plaintiffs had paid Rs. 600 of the consideration-money, observing as follows: "In my opinion the sale in favour of the plaintiffs is not without consideration: 260 bighas of land by village measurement was sold for Rs. 800; the consideration-money, as stated in the deed, was paid in this manner, that is to say, Rs. 600 were credited towards the payment of the mortgage-money, this mortgage-money being the consideration of the usufructuary mortgage in favour of the plaintiffs; and the remaining Rs. 200 are alleged to have been paid in cash: at any rate Rs. 600 had been most assuredly received by the seller: as regards the sum of Rs. 200, I think it proper that the vendor's heirs should sue the plaintiffs to recover it, if it has not been been paid, and in that case the question of its payment or non-payment may be determined: at all events there was consideration, and it cannot be said that there was no consideration." The Court of first instance in the event gave the plaintiffs a decree. The defendants Ganga Prasad and Dirag Singh alone appealed, again raising the question whether they had received the consideration for the sale to the plaintiffs. The lower appellate Court, concurring with the Court of first instance, decided that the defendants had received Rs 600 of the consideration-money; but it further decided that they had not received the balance remaining, Rs. 200; and, thinking that the plaintiffs were claiming possession of the land in question, held that they were only entitled to possession on payment of such balance, and made a decree accordingly. The plaintiffs appealed to the High Court.

Lala *Lalta Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondents.

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The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—The plaintiffs' case is that the defendants-respondents sold the land in dispute to them by deed of sale, dated 13th July, 1868, for Rs. 800, and delivered the sale-deed; they were previously in possession as mortgagees of part of the land, and the rest was and is still in possession of other parties as mortgagees; that the respondents have now sold part of the land to other persons; and they seek to have this sale set aside and their proprietary right declared in the property; the above is the substance of the relief they seek. The respondents contended that the sale was fictitious, made with a view to save the property from the claims of creditors, and that no consideration was paid. Both Courts have held that the sale was *bonâ fide* and completed, and that Rs. 600 out of the consideration was received; but the Court of first instance gives no finding as to whether part of the consideration, *viz.*, Rs. 200, alleged by plaintiffs to have been paid in cash, was so paid, referring the respondents to a suit should they lay any claim to it. The lower appellate Court, on the other hand, has gone into that question, and decided that Rs. 200 was not paid, and directed that the plaintiffs should get possession of the land conditionally on payment of the sum of Rs. 200. The plaintiffs appeal in respect of this part of the decree. The lower appellate Court appears to us to have neither understood the claim, nor the character of the defence set up. Actual possession on the land was not claimed; since the plaintiffs are in actual possession of part, and the rest is in possession of mortgagees; what the plaintiffs substantially seek is to have the second sale set aside and their right in the property under their sale declared. The defence was not that part of the price had not been paid, and that in consequence the the plaintiffs were not entitled to the property, but that no sale at all took place. It has been found that at any rate Rs. 600 out of the consideration has been received, and the deed of sale was executed, registered, and delivered, and the plaintiffs obtained all the possession on the property which the nature enabled them to obtain; there was thus a completed contract of sale, and the property vested in the plaintiffs, and their right in it should be de-

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clared, leaving the respondents, if they have any claim to make in respect of any part of the purchase-money, to seek it in any way they may be advised.—See *Roy Koour* v. *Juswunt Koour* (1), and *Toolsee Singh* v. *Pandey Bhyro Deen* (2).

We therefore modify the decree of the lower appellate Court by restoring that of the Court of first instance with costs.

Appeal allowed.

1881 *December* 20.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SHAFKAT-UN-NISSA (PLAINTIFF) *v.* SHIB SAHAI AND OTHERS (DEFENDANTS).

Act X of 1877 (*Civil Procedure Code*), *s.* 43.

J had a right to share in a certain estate, as an heir to her father, and also as an heir to her brother. She transferred such right by sale to *H*. *H* sued *S*, who had acquired the whole estate by purchase at sales in execution of decrees against the other heirs of *J*'s brother, for *J*'s share as one of her brother's heirs in such estate, and obtained a decree. *H* then sued *S* for *J*'s share as one of her father's heirs in such estate. *Held* that *H* was debarred from bringing the second suit by the provisions of s. 43 of Act X of 1877.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambhar Nath* and Shaikh *Maula Bakhsh*, for the appellant.

Babus *Oprokash Chandar Mukarji* and *Jogindro Nath Chaudhri*, for the respondents.

The judgment of the High Court (BRODHURST, J., and TYRRELL, J.,) was delivered by

TYRRELL, J.—Shah Sahib-ud-din died in 1874, leaving as heirs to his property movable and immovable, in Meerut and in Moradabad, three persons, his two widows, and his sister. They are Banno Begam, Umrao Begam, and Jheoni Begam. Their names were duly recorded in respect of the Moradabad villages, but in the Meerut district the record was made in favour of Banno Begam,

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* Second Appeal, No. 459 of 1881, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 24th December, 1880, reversing a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 8th November, 1880.

(1) N.-W. P. S. D. A. Rep., 1861, vol. ii, p. 576.

(2) N.-W. P. S. D. A. Rep., 1864, vol. ii, p. 617.

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Umrao Begam, and Tajammul Husain, a son of Banno Begam, out of wedlock with Sahib-ud-din. The Meerut estate of the latter consisted of five biswas in mauza Deoli, being four biswas in his own right and one biswa as "*asba*" of his brother. Banno Begam died in 1876, and her son Tajammul Husain was recorded as her heir. Meantime one Fakirat-un-nissa had obtained in a Moradabad Court decrees against Umrao Begam, which were transferred for execution to the Meerut district. Under these decrees two-thirds of the Deoli estate, being the "rights and interests therein of Tajammul Husain, Umrao Begam, and Banno Begam" were sold at auction on the 20th February, 1877, to Shib Sahai, the principal respondent before us. But in 1874 Tajammul Husain had raised money from Ram Sarup and Bhim Sein on the security of the Deoli estate, and again in 1878 he mortgaged to Shib Sahai all his rights and interests therein. Jheoni Begam in Moradabad was not privy to any of these transactions. Ram Sarup and Bhim Sein got a decree against Tajammul Husain for their debt, and brought to auction all "his rights and interests in the Deoli estate," which were purchased by Shib Sahai on the 20th September, 1878. Thus two distinct and separate alienations, made, if not by the voluntary action of the heirs recorded in Meerut, at least as the direct consequence of their dealings with the Sahib-ud-din estate, operated to transfer to Shib Sahai the whole five biswas on the 20th February, 1877, and the 20th September, 1878.

But Jheoni Begam of Moradabad, though a stranger to these alienations of her property, was not oblivious of her rights in the Deoli estate as heiress to her father Kutb-ud-din, and residuary of her sole surviving brother Sahib-ud-din at and after his death in 1874. She disposed of all these rights by sale to Shafkat-un-nissa, the appellant before us, under two deeds, one of the 11th March, 1874, conveying six out eight sahams in the estate of her brother Sahib-ud-din, being her inheritance from him, and two sahams inherited from her father Kutb-ud-din. These shares amount together to about five biswas of the ancestral property. The appellant before us sued on the March deed in February, 1879, and obtained a decree (13th January, 1880,) for her six sahams out of eight in Sahib-ud-din's Deoli estate against the present principal respondent Shib Sahai. The appellant has now brought the present suit for recovery from

the same Shib Sahai and from Mumtaz-un-nissa of the property covered by the second sale-deed dated May, 1874.

The above recital of facts is necessary for the proper appreciation of the question whether the second, that is to say, the present, suit is barred by the provisions of s. 43 of the Civil Procedure Code.

It is plain that the plaintiff's right of action, to wit, her inheritance from her father and from her brother, had accrued to her before she brought the first suit. It is indisputable that the parties to both actions are substantially the same, the alienees of Sahib-ud-din's heirs being in fact Shib Sahai alone in his own and his brother's names; and it must be admitted that as regards this alienee the plaintiff's common cause of action in both suits arose from the circumstances that the possession of a part of her inheritance was wrongfully withheld. It cannot affect the principle embodied in the rule of s. 43 that the plaintiff's title in respect of the whole inheritance happened to have a double root. This circumstance would not alter the wholeness of her claim as against the alienee of the false heirs arising out of her one cause of action against him, which was nothing but his possession on a bad title to her wrong. It is possible that, if the portions of the inheritance coming to the plaintiff through her father and brother respectively had been defined and ascertained, and if the first transfer had purported to alienate the one portion so ascertained and specified, the other similarly purporting to affect the other known share, the Court might see its way to a decision not adverse to the present suit. Under such circumstances it might have been held that each alienation constituted a distinct cause of action, and that it was therefore not obligatory upon the plaintiff to make each separate purchaser a party to her first suit upon pain of forfeiting all future right of suit against them by reason of such omission. But it has been shown that these circumstances do not subsist in the former and in the present action of the appellant: but that on the contrary she had in February, 1879, one cause of action against Shib Sahai and Jiwan Singh in respect of her whole claim, which she has chosen to split up into two claims, in all essential respects identical, against the same parties; and she must therefore be held to be debarred from bringing the present action by the rule of the

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second clause of s. 43, Act X of 1877. In this view of the law as applicable to the peculiar facts of this case, the decree of the lower appellate Court is affirmed, and this appeal is dismissed with costs

Appeal dismissed.

1881 December 20

Before Mr Justice Brodhurst and Mr Justice Tyrrell

BHOLAI (DEFENDANT) v. THE RAJAH OF BANSI (PLAINTIFF) *

Land holder and Tenant—Planting trees—Ejectment.

A tenant planted trees on one of the plots of land comprising his holding, an act which rendered him liable to ejectment He paid rent, not in respect of each plot of land, but in respect of the entire holding. *Held* that he was liable to ejectment, not merely from the plot on which he had planted the trees, but from his entire holding.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case for the trial of the issue set out in such order.

Lala *Lalta Prasad* and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, Maulvi *Mehdi Hasan*, and Shaikh *Maula Bakhsh*, for the respondent.

The High Court (TYRRELL, J., and DUTHOIT, J.,) made the following order of remand :—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Gorakhpur, reversing a decree of an Assistant Collector of the first class (Mr. J. H. Carter), by which a suit brought by the Raja of Bansi against Bholai, Kurmi, under s. 93 (*b*) of Act XVIII of 1873 was dismissed. The plaint alleged that the defendant, a tenant with right of occupancy, had forfeited his rights, and was liable to ejectment, by reason of his having, in Asadh, 1286 fasli, on plot No. 1177 (17 biswas in extent), being part of his holding, (i) planted trees of various kinds : (ii) dug a well: (iii) built a house. For the defence the planting of any trees upon the land referred to, at the time stated, and the construction of a well proper were denied ; it was alleged that all, as regarded trees, that the defendant

* Second Appeal, No 108 of 1881, from a decree of R. Saunders, Esq , Judge of Gorakhpur, dated the 29th November, 1880, reversing a decree of J H Carter, Esqs, Assistant Collector of the first class, Basti, dated the 17th July, 1880.

had done was to re-plant vacant spaces in a grove which (with the permission of the zamindar) he had laid out four years before; it was admitted that he had dug a "*chaunda*" (1) well, and built a hut upon the land; but it was pleaded (i) that the suit was barred by limitation (s. 94 of Act XVIII of 1873); (ii) that the plaintiff was estopped by the terms of a compromise made with the defendant on the 17th June, 1879; (iii) that nothing done by the defendant is detrimental to the land in his occupation or inconsistent with the purpose for which the land was let. The following issues were framed for trial by Deputy Collector Harnam Chandar Seth before whom the suit was originally heard: (i) Whether defendant has planted a grove and built a house and well during the last twelve months, or that grove was planted by him four years ago together with the well; and the house was prepared sixteen months ago; if the latter, is the claim barred by limitation? (ii) Whether defendant's action meets the requirement of cl (*b*), s. 93, or not? (iii). Should defendant's action meet the requirements of cl. (*b*), s. 93, is he liable to ejectment from his entire holding, or only of a part? Evidence on both sides was recorded, and a local inquiry, upon five points noted by the Deputy Collector for investigation, was held by a naib-tahsildar. The suit was almost ready for decision when it came before Mr. Carter, and was disposed of in these words: "I have no sympathy for suits of this tenor: I am able to throw it out on a legal ground: Lala Balkaran Lal is vakil, not accompanied by any one who has personal knowledge of the facts of the case: defendant is present: no order as to costs."

The plaintiff appealed to the Judge, who decided that the Assistant Collector's order was illegal, and that the plaintiff's case being fully satisfied, he was entitled to a decree.

In second appeal it is contended that the suit was barred by limitation, and that, even on the facts found by the lower appellate Court, the defendant (appellant) should not have been ejected from his entire holding.

The former of these pleas depends upon the determination of the date of the acts on the allegation of which the suit is based, and from the evidence in the record we see no reason to doubt

(1) A well of a temporary nature.

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that the date assigned to them by the plaintiff is the true one. The compromise, though not referred to in the written grounds of appeal, has been pleaded in the argument. It has no connection with the matter now in suit. The acts complained of are of date subsequent to it. The digging of a well is certainly not an act detrimental to the land, or inconsistent with the purposes for which it was let; but the same cannot be said of the building of the house, or of the planting of the trees.

Whether, however, the appellant has become liable to ejectment from his entire holding of 68 bighas odd, or only from a single plot (No. 1177), is a question the answer to which must depend upon whether each separate plot or number of his holding bears a distinct rent, or the Rs. 115, which he appears to pay as rent, is a lump sum issuing from his entire holding, and the materials for a decision upon this question are not on the record. In the terms, therefore, of s 566 of the Code of Civil Procedure, we refer the following issue for trial to the lower appellate Court: Does the rent paid by the defendant (appellant) issue from his entire holding, or does each separate plot or number thereof bear a distinct rent? The lower appellate Court will take such additional evidence as may be required, and will return the same with its finding upon the issue to this Court within three weeks. On such return, ten days will be allowed for objections, from a date to be fixed by the Registrar. Costs of the inquiry will be costs in the suit.

The lower appellate Court found on such issue that the defendant's rent was a lump sum assessed upon his entire holding, no separate rate being recorded in respect of any one of his fields. Upon the return of this finding, the High Court (BRODHURST, J., and TYRRELL, J.) delivered the following judgment:

TYRRELL, J —On the return to our order of remand the respondent is shown to be entitled to the decree he obtained from the lower appellate Court. But under s. 149 of the Rent Act we modify the same, by ordering that it be not executed provided the appellant within thirty days from this date shall remove the house and trees complained of, and restore the site thereof to their former condition. This appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Oldfield.

1881
December 21.

JANKI (PLAINTIFF) *v.* DHARAM CHAND AND OTHERS (DEFENDANTS)*

Suit against minor—Permission to relative to defend—Act XL of 1858, *s.* 3.

The mother of a minor, who did not hold a certificate under Act XL of 1858, was sued on behalf of the minor. She did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor. *Held* that, under these circumstances, it must be inferred that the Court had given her permission to defend the suit, as required by s. 3 of Act XL of 1858, and therefore the decree made against her in the suit as representing the minor was binding on the latter.

THE plaintiff in this suit claimed Rs. 70 arrears of maintenance, basing her claim on a decree, dated the 21st December, 1870. It appeared that in the year 1870 the plaintiff had sued one Makhum Bahu in her own person and as the mother and guardian of her minor sons, Dharam Chand and Sham Chand, and one Bramha Dat, for maintenance; and that on the 21st December, 1870, she obtained a decree in that suit for a certain allowance by way of maintenance. In the present suit the plaintiff sought to recover from Dharam Chand and Sham Chand, who had attained majority, and Bramha Dat, arrears of such allowance, claiming by virtue of such decree. The defendants Dharam Chand and Sham Chand set up as a defence to the suit that the decree did not bind them, as they were not parties to the suit in which it was made, and such suit had not been defended on their behalf by any one competent to defend it. The Court of first instance framed as one of the issues for trial the issue: "Whether Dharam Chand and Sham Chand, defendants, are bound by the decree which forms the basis of this suit?" The Court held that those defendants were not bound by that decree, and accordingly dismissed the suit as regards them, observing as follows: "According to the rulings noted below, Dharam Chand and Sham Chand were not parties to that suit, and the decree passed therein was therefore not binding on them: even if granted, for the sake of argument, that these defendants were parties to the former suit, inasmuch as Makhum Bahu had no certificate under Act XL of 1858, she had no right to defend the suit for them, and the decree

* Second Appeal, No. 466 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 30th March, 1881, affirming a decree of Babu Mir'on-joy Mukarji, Munsif of Benares, dated the 9th September, 1880.

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passed therein cannot be held to be binding on them." On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance, observing as follows: "Makhum Bahu, mother of the defendants, did not obtain a certificate under Act XL of 1858, nor permission from the Court having jurisdiction to defend the former suit on behalf of her sons; and it is clear that the minors, defendants in the present suit, were not made defendants, for there were only two defendants in that case, and they are referred to throughout the proceedings as Makhum Bahu defendant No 1, and Bramha Dat Misr defendant No. 2."

The plaintiff appealed to the High Court, contending that it should be presumed that the Court in the former suit had allowed the mother of the defendants to defend the suit on their behalf, and therefore the defendants had been properly represented in that suit, and were bound by the decree made therein.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.,) was delivered by

STRAIGHT, J.—We think that the mother of the respondents Nos. 1 and 2, having been cited in the suit of 1870 as their representative, and allowed by the Court, in which the proceedings were instituted, to answer, as well for her sons as herself, may fairly be regarded as within the proviso of s 3 of Act XL of 1858. In other words, we consider that we are justified in inferring that Makhum Bahu was allowed by the Court having jurisdiction to defend the suit on behalf of Dharam Chand and Sham Chand, respondents Nos 1 and 2, who are therefore bound by the decree of 1870. As the case has been decided by both the lower Courts erroneously in reference to this point, their decisions must be reversed, and the suit must be remanded to the Munsif of Benares for disposal on the merits. Costs will follow the result.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst

1881
December 23.

BHOLI AND ANOTHER (DEFENDANTS) *v.* IMAM ALI AND OTHERS (PLAINTIFFS).*

Pre-emption—Joint sale of share of undivided mahál and other property—Act XV of 1877 (Limitation Act), sch. ii, No. 10.

In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided mahál, which does not admit of physical possession, limitation will run from the date of registration of the instrument of sale.

THIS was a suit to enforce a right of pre-emption, instituted on the 30th January, 1880, in respect of a sale under an instrument dated the 11th November, 1878, and registered on the 13th November, 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Hanuman Prasad and Munshi *Sukh Ram*, for the appellants.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondents.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD J.—This is a suit for pre-emption in respect of a sale of certain property under a deed of sale dated the 11th November, 1878, and registered on the 13th November, 1878. The property sold consists of a ten-biswa share in a zamindari estate, mauza Mohi-uddin-pur, and the half of certain lands in mauza Shahbazpur, held in common, the price for the whole property entered in the sale-deed being Rs. 2,500. The claim has been decreed; and the material plea taken in appeal is that the suit is barred by limitation, and it is one which we must allow. By art. 10, sch. ii of the Limitation Act, if the subject of the sale does not admit of physical possession, the period will run from the date of registration of the instrument of sale.

It has been held by the Full Bench of this Court in *Unkar Das* v. *Narain* (1) that a share in an undivided mahál, such as is the subject of part of the sale in this case, does not admit of physical possession in the sense in which the words are used in the article;

* Second Appeal, No. 355 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 14th January, 1881, affirming a decree of Maulvi Maqsud Ali, Subordinate Judge of Moradabad, dated the 31st August, 1880.

(1) I. L. R., 4 All. 24.

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BHOLI v. IMAM ALI.

and following that ruling the whole of the property sold under the sale sought to be impeached will not admit of physical possession, and the period will run from the date of registration of the instrument of sale, and the suit will be barred.

Whether or not there was or could be physical possession of the share of common lands which formed part of the property sold is immaterial, and need not be determined, as the article contemplates the taking under the sale sought to be impeached of physical possession of the whole of the property sold, and there have not been separate sales of different properties, but all together have been the subject of one sale.

It was urged that the plea of limitation was not originally based on the ground that the property did not admit of physical possession, but that such possession had been taken immediately after the sale, but this objection to the plea has no force. The former pleading arose out of a mistake of fact in consequence of an erroneous construction of the words "physical possession," and the objection falls to the ground, with reference to s. 4 of the Act, which requires the dismissal of a suit, although limitation has not been set up as a defence.

The appeal is decreed, and the decrees of the lower Courts reversed, and the suit dismissed with all costs.

Appeal allowed.

1880
May 6.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BANDA HASAN (DEFENDANT) *v.* ABADI BEGAM (PLAINTIFF).

Lease by usufructuary mortgagee of mortgaged property to mortgagor—Hypothecation of mortgaged property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court—Act X of 1877 *(Civil Procedure Code), s.* 43.

The usufructuary mortgagee of certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the mortgagor in the Civil Court to recover the amount of such decree by the sale of

*Second Appeal, No. 1063 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 11th July, 1879, affirming a decree of Maulvi Aziz-ud-din, Munsif of Pilibhít, dated the 5th June, 1879. Reported under the order of the Hon'ble the Chief Justice.

the land, claiming under the hypothecation. *Held* that the second suit was not barred by the provisions of s. 43 of Act X of 1877.

ABADI BEGAM, the plaintiff in this suit, the usufructuary mortgagee of certain land, gave Muhammad Jafar, the mortgagor of such land, a lease thereof for a term of five years, from the beginning of 1282 fasli, at an annual rent of Rs. 250, such lease being dated the 10th October, 1874. As security for the payment of such rent Muhammad Jafar hypothecated such land. The latter having failed to pay the stipulated rent, Abadi Begam sued him in the Revenue Court for arrears, and on the 12th September, 1876, obtained a decree for Rs. 500 odd. Subsequently, on the 24th September, 1878, Banda Hasan, the defendant in this suit, obtained a decree for such land under a right of pre-emption. In March, 1879, Abadi Begam brought the present suit against Banda Hasan to recover the amount of the decree given her by the Revenue Court by the sale of such land. The defendant set up as a defence to the suit that, as the plaintiff had omitted in her former suit to claim enforcement of her lien on such land, she was debarred from claiming the same by the provisions of s. 43 of Act X of 1877. Both the lower Courts disallowed this defence on the ground that the plaintiff could not in her former suit have claimed enforcement of her lien, as such suit had been instituted in the Revenue Court, which could not entertain such a claim.

On second appeal the defendant again contended that the present suit was barred by the provisions of s. 43 of Act X of 1877.

Babu *Oprokash Chandar Mukarji*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (STUART, C. J. and STRAIGHT, J.), so far as it related to this contention, was as follows:—

STRAIGHT, J.—We desire to add, with regard to the contention urged before us on behalf of the appellant, that the present suit was excluded by s. 43 of Act X of 1877, or the analogous provision of Act VIII of 1859, that we are clearly of opinion such objection has no force. At the time of the suit in the Revenue Court the parties stood in the relation of landlord and tenant, and the arrears of rent were therefore properly sued for in the Revenue Court.

1880

BANDA HASAN v. ABADI BEGAM.

The present claim could only be made through the medium of the Civil Court, and the shape in which it is presented appears to us perfectly regular.

Appeal dismissed.

1881 *December* 24.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* BHAWANI PRASAD AND ANOTHER.

Act XLV of 1860 (*Penal Code*), *s.* 211—*False charge—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 146, 147.

Where a Magistrate dismisses a complaint as a false one under s. 147 of the Criminal Procedure Code, and decides to proceed against the complainant under s. 471, for making a false charge, he is not bound before so proceeding to give the complainant an opportunity of substantiating the truth of the complaint, by being allowed to produce evidence before him.

THIS was an appeal from a judgment of Mr. R. J. Leeds, Sessions Judge of Gorakhpur, dated the 8th September, 1881, convicting the appellants, Bhawani Prasad and Goli, of an offence under s. 211 of the Indian Penal Code.

The appellants had jointly made a complaint charging one Sheobhik and certain other persons with abetting the false personation of Bhawani Prasad before a Sub-Registrar of documents, an offence punishable under s. 82 of the Indian Registration Act, 1877. The Magistrate receiving the complaint, after directing a local investigation by the police into its truth, under s. 146 of the Criminal Procedure Code, dismissed it under s. 147, after examining the appellants. He then, being of opinion that the appellants had made a false charge against Sheobhik and the other persons, proceeded to make an inquiry into the case, and eventually committed the appellants for trial before the Court of Session for an offence under s. 211 of the Indian Penal Code. The Court of Session convicted the appellants of that offence.

On appeal to the High Court it was contended on behalf of the appellants, *inter alia*, that the Magistrate had improperly committed them for trial, as he had not given them an opportunity of substantiating the truth of the complaint they had preferred.

Mr. *Simeon*, for the appellants.

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EMPRESS OF INDIA v. BHAWANI PRASAD.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

OLDFIELD, J.—The offence charged under s. 211, Indian Penal Code, has been clearly proved against the prisoners; but it is urged that the convictions should be set aside, inasmuch as they had no opportunity of proving the complaint they brought in the Magistrate's Court and which led to their committal and trial.

I find that the Magistrate examined them in respect of their complaint, and under ss. 146 and 147, Criminal Procedure Code, after directing an inquiry by the police, dismissed the complaint; and under s. 471, after making a preliminary inquiry, committed the accused for trial to the Sessions on charges of an offence under s. 211, Indian Penal Code. There is nothing illegal in the procedure of the Magistrate, and there is nothing in the law which requires that a complainant shall have an opportunity of substantiating his complaint, by being allowed to produce evidence before the Magistrate, before the latter can take steps against him under s. 471, Criminal Procedure Code. The commitment and trial are not therefore open to objection or liable to be set aside on the ground of illegality or irregularity. Even assuming the course taken by the Magistrate to have been irregular, it must be shown that the accused have been prejudiced thereby in their defence, before the conviction can be set aside, but nothing of the sort has been shown. They had full opportunity for proving the truth of their original complaint when put on their trial in the Sessions Court, and the fact that they had no opportunity in the Magistrate's Court to produce evidence in proof of their complaint in no way interfered with their proving it at the trial. In this view I am supported by the decision of this Court in *Empress* v. *Abul Hasan* (1) and *The Queen* v. *Subbanna Gaundan* (2).

(1) I. L. R., 1 All. 497. (2) 1 Mad. H. C. Rep., 30.

1882
January 3.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

GOPAL DAS AND ANOTHER (PLAINTIFFS) *v.* THAN SINGH (DEFENDANT).*

Delivery of possession in execution of decree—Subsequent continuance in possession of judgment-debtor—Fresh suit for possession—Right to fresh execution of decree.

When formal possession of immoveable property has been delivered according to law to a person holding a decree for the delivery of the same, the subsequent continuance in actual possession of the judgment-debtor does not give the decree-holder a right to a fresh order for delivery of possession in execution of the decree, but gives him a right to institute a fresh suit for possession of such property.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Kashi Prasad* and Babu *Ram Das Chakarbati*, for the appellants.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.,) was delivered by

STRAIGHT, J.—On the 15th February, 1877, the plaintiffs obtained a decree from the Munsif of Jalesar against the two defendants Pirthi and Murli for possession of the land now in suit, also against Than Singh, the other defendant, respondent, for certain mesne profits in respect of such land. This decree was enforced in execution on the 23rd February, 1877, and under an order of the Munsif of that date directing that the decree-holders should be put in possession by ejecting the defendants, the plaintiffs obtained possession according to the law then in force, as appears from the report of the amin of the 7th March, 1877, to the effect that he had put the decree-holders into possession by dispossessing the defendants. Meanwhile the defendants had appealed to the Judge of Agra from the decision of the Munsif, and on the 6th June, 1877, the Subordinate Judge allowed the appeal on a preliminary point, and reversed the first Court's judgment. The

* Second Appeal, No. 1043 of 1880, from a decree of J Alone, Esq, Judge of the Court of Small Causes at Agra, exercising the powers of a Subordinate Judge, dated the 10th June, 1880, modifying a decree of Maulvi Munir-ud-din, Munsif of Jalesar, dated the 4th December, 1879.

decision of the Subordinate Judge was in turn appealed by the plaintiffs to this Court and with success, and the case was remanded back to the lower appellate Court for disposal on the merits. On the 10th May, 1878, the Subordinate Judge restored the Munsif's original decision of the 15th February, 1877, in favour of the plaintiffs, and a subsequent appeal against this decision by the defendants to this Court was dismissed. On the 23rd August, 1878, the plaintiffs applied in execution for possession of the land decreed, but on the 30th of the same month their application was refused, the Munsif holding that, as it appeared "that formerly formal possession was given through the Amin, no second order for possession could be given, and that, if the decree-holders had been dispossessed since getting possession, they could proceed according to law." The present suit, which is for possession and mesne profits, as also to set aside the miscellaneous order of the 30th August, 1878, was instituted on the 9th June, 1879. The Court of first instance decreed the claim for possession, but disallowed a portion of it as to mesne profits. The Subordinate Judge reversed the decision of the Munsif as to possession, but in other respects affirmed it. The plaintiffs now appeal to this Court, and the substantial point to be considered is, whether the present suit can be maintained, the contention of the respondent being that the question of possession having been determined in execution by the order of the 30th August, 1878, from which no appeal was preferred, the claim is barred. It is true that the plaint is not as artistically framed as it might have been, but looking at it in its entirety and placing a reasonable construction upon its language, we think it may be taken to allege that the plaintiffs-appellants, having once obtained possession in accordance with law under a decree of Court, have, by the subsequent continuance on, and cultivation of, the land in suit by the defendants-respondents, been dispossessed. Hence an adequate and legitimate cause of action. In our opinion the Munsif acted rightly in refusing to make any fresh order for possession, when he found upon the file the distinct acknowledgment by the plaintiffs-appellants that they had received possession on the 7th March, 1877, and that the case had been struck off in consequence of the decree being satisfied. It was vigorously argued before us that a dis-

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tinction should be drawn between merely formal and actual possession, and that no suit of the kind now before us can be brought, unless the party complaining has held tangible possession of land or premises, and been illegally ousted therefrom. It does not appear to us, however, that we are required to allow any such difference. Both Act VIII of 1859 and Act X of 1877 make distinct provision as to the mode in which possession is to be given to a successful decree-holder, or an auction-purchaser at sale in execution of decree, and we presume that in using the word "possession" some practical meaning was intended to be attached to the action of the Courts enforcing their own orders in execution. It is obvious that a possession, once obtained in accordance with the provisions of law, even though not actual, would stop the acquirement of hostile right by adverse possession for more than twelve years, and this principle seems to have been distinctly recognised in a Privy Council ruling in *Gunga Gobind Mundul* v. *Bhoopal Chunder Biswas* (1). If then possession accorded by the intervention of the Court is sufficient for the purpose of saving limitation, it may likewise be fairly regarded as adequate to supply the basis for a suit, in the event of subsequent dispossession or obstruction, after possession once obtained by operation of law. In the present case it is proved that the plaintiffs-appellants got possession on the 7th March, 1877, under the provisions of the law then in force, and it has been found as a fact that the two defendants Pirthi and Murli since then have cultivated the land now claimed, and that Than Singh, the other defendant, respondent, has received rent from them against the will of the plaintiffs-appellants. In our opinion those facts disclose a sufficient cause of action to justify the maintenance of the present suit, and we think that the Subordinate Judge took an erroneous view of the case. The appeal will therefore be decreed with costs, and the judgment of the Court of first instance be restored.

Appeal allowed.

(1) 2 Suth. P C. C. 750.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

1882
January 2.

BARKAT (PLAINTIFF) *v.* DAULAT AND OTHERS (DEFENDANTS)*

Trustee—Express trustee—Absent co-sharer—Limitation—Act XV of 1877 (Limitation Act), s. 10.

S. 10 of the Limitation Act, 1877, has reference to express trustees, and in order to make a person an express trustee, within the meaning of that section, it must appear either from express words or clearly from the facts that the rightful owner has intrusted the property to the person alleged to be a trustee for the discharge of a particular obligation.

In 1813 *S*, being unable to pay the Government revenue due on his land, abandoned his village. In 1838 *H*, who had paid the revenue due by *S*, and had taken, or obtained from the Government, possession of *S's* land, attested a village-paper in which it was stated that, if *S* returned and reimbursed him, he should be entitled to his land. Sixty years after *S* abandoned his village *B*, as the representative of *S*, sued the representative of *H* for such land, alleging that it had vested in *H* in trust to surrender it to *S* or his heirs on demand. As evidence of such trust *B* relied on the village-paper mentioned above, and on the village administration-paper of 1862, in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue due by them.

Held that such documents did not prove any express trust, within the meaning of s. 10 of the Limitation Act, 1877, and the suit was therefore barred by limitation.

THE plaintiff in this suit claimed certain land in a village called Baheri. It appeared that in or about the year 1813 the plaintiff's father, Sibba, and his uncle, Ghariba, to whom such land belonged, and through whom the plaintiff claimed, had deserted the village in consequence of their inability to pay Government revenue. Thereupon certain co-sharers in the village, named Hakumat and Himmat, represented in this suit by the defendants, had paid the arrears of revenue due by Sibba and Ghariba, and had taken or obtained from Government possession of such land. The plaintiff alleged that such land had been held by Hakumat and Himmat upon trust to surrender it to the proprietors on demand. As evidence of such trust the plaintiff relied on the "*khatiauni sharah asamiwar*," one of the documents comprised in the *wajib-ul-arz* of the village framed in 1838. In that document it was recorded that Sibba and Ghariba had deserted the village some twenty years before; that Hakumat and Himmat, who were in possession of their land,

*Second Appeal, No. 578 of 1881, from a decree of R. M. King, Esq., Judge of Sahâranpur, dated the 15th February, 1881, affirming a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 4th December, 1880.

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had paid the revenue due by them; and that when they returned and reimbursed Hakumat and Himmat they should be considered proprietors of their land. This document was attested by Himmat. The plaintiff also relied on the village administration-paper of 1862 in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue due by them. The defendants set up as a defence to the suit that it was barred by limitation, as the land had not been held by their predecessors or by them as trustees. Both the lower Courts held that the plaintiff had failed to prove any trust, and dismissed the suit as barred by limitation. On second appeal the plaintiff again contended, with reference to the terms of the "*khatianni sharah asamiwar*" and of the administration-paper, that the trust alleged by him was established.

Munshi *Sukh Ram*, for the appellant.

Shah *Asad Ali*, for the respondents.

The judgment of the Court (OLDFIELD, J., and TYRRELL, J.) was delivered by

OLDFIELD, J.—The plaintiff's case is that his ancestors left their native village about sixty years ago, in consequence of inability to pay their quota of revenue, and the defendants or those they represent obtained possession of their holdings as trustees, and the plaintiff seeks to recover the property. The defendants deny that there was any trust, and plead limitation by adverse possession. Both Courts have found that there is no trust proved such as will avoid limitation under the provisions of s. 10 of the Limitation Act, and this is the question raised in the appeal which the plaintiff has preferred.

S. 10 provides that "no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time."

This provision refers to express trusts, and a recent decision in the Chancery Division of the High Court of Justice in *Banner* v. *Bridge* (1) has been brought to our notice, where the question as

(1) L. R., 18 Ch. D. 254.

to what constitutes an express trust for the avoidance of the Statute of Limitation was considered, and the authorities noticed by Kay, J. Vice-Chancellor Kindersley's judgment is referred to in which he says that the term "does not mean a trust that is to be made out by circumstances, the trustee must be expressly appointed by some written instrument, and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long so ever he may have been in enjoyment of the property, from setting up the statute. But if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply, and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be right owner (1)."

The necessity that the trust shall be in writing would appear to have reference to trusts of land only under English law, to which Vice-Chancellor Kindersley's remarks would seem to have had reference, and the case of *Burdick* v. *Garrick* (2) is referred to to show that there may be an express trust without any writing, or any actual expression in words that there was a trust, in cases where property belonging to a person has been deposited with another for the benefit of the depositor. That was a case in which judgment was delivered by Lord Hatherley, where an agent was intrusted with funds for the purpose of being employed in a particular manner in purchase of land or stock, and it was held that there was an express trust to which the Statute of Limitation did not apply.

In order to make a person an express trustee within the meaning of the Limitation Act it must appear either from express words or clearly from the facts that the rightful owner has intrusted the property to the person for the discharge of a particular obligation. Now nothing of the sort appears in the case before us. The only evidence to show an express trust to which we are referred consists of some entries in a *khatiauni* (part of the revenue records

(1) at p. 262. (2) L. R., 5 Ch. 233.

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of the estate) bearing date 1838, and in an administration-paper of the estate dated 1862. The latter contains nothing more than a general statement that absentee share-holders may recover their shares on payment of arrears of revenue due by them, and the *khatiauni* contains an entry to the effect that two persons now represented by defendants are in possession of the shares of certain persons (whom plaintiff claims to represent), and the record states that the latter went away twenty years ago, and the defendants' ancestors have paid a sum of money on account of revenue due by them, and that the said absentees shall be entitled to the property on their return, and on payment of the said sum, and the record purports to be attested by one of the persons who took the property.

There is nothing here to show an express trust; what appears to have taken place is that the plaintiff's alleged ancestors left the village, and the persons whom defendants represent paid arrears of Government revenue due by them, and were put in possession in consequence of their property, probably by Government, in the absence of the rightful owners, and held the property for their own benefit, and that they voluntarily recorded their willingness to restore the property to the particular absentees named, on their return, and on their refunding the sum paid. The Courts below have rightly held that there is no trust within the meaning of s. 10 of the Limitation Act, and the appeal fails and is dismissed with costs.

Appeal dismissed.

1882
January 3.

Before Mr. Justice Straight and Mr. Justice Oldfield.

ABDUL RAHMAN (JUDGMENT-DEBTOR) *v.* MUHAMMAD YAR (DECREE-HOLDER).*

Execution of decree—Decree against firm—Attachment of property as property of firm—Claim by partner to property as private property—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 244 (*c*), 281.

The holder of a decree against a firm caused certain property to be attached in execution of the decree as the property of the firm. One of the partners in the firm objected to the attachment on the ground that such property was not the property of the firm, but was his private property. The Court disallowed the

*Second Appeal, No. 56 of 1881, from an order of R. D. Alexander, Esq., Judge of Allahabad, dated the 3rd June, 1881, affirming an order of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad, dated the 2nd April, 1881.

objection, whereupon such partner appealed from the order disallowing the objection. *Held* that such order was not one under s. 244 (*c*) of Act X of 1877, but under s. 281, and was therefore not appealable.

MUHAMMAD YAR held a decree for money against Bhaggu and Abdul Rahman, a minor, which he was entitled, under it terms, to execute against Bhaggu and Abdul Rahman's share in the property belonging to the firm of Bhaggu and Maula Bakhsh. The decree-holder caused a certain house to be attached in execution of the decree as the property of the firm. Thereupon an objection to the attachment of this house was preferred on behalf of Abdul Rahman by his mother and guardian, who claimed it as the exclusive property of her son. The Court executing the decree, the Subordinate Judge, disallowed this objection, finding that the house belonged to the firm and not to Abdul Rahman exclusively. Abdul Rahman appealed from the Subordinate Judge's order to the District Judge. The District Judge held that an appeal in the case would not lie, for reasons which appear from the following order made by him:

"I am of opinion that in this case no appeal lies. It is admitted that the decree in the execution proceedings of which this order which is appealed against was made was against the present appellant as partner in the firm of Bhaggu and Maula Bakhsh, Bhaggu the other partner of the firm being a joint judgment-debtor, and the decree being against the firm. In the execution proceedings the decree-holder proceeded to attach a house as the property of the firm which the appellant claimed as his separate property. This was not therefore a question under cl. (*c*), s. 244, between the parties to the suit in which the decree was passed, because the present appellant did not in the objection he preferred to the lower Court against the sale of this house fill the same capacity as he did in the suit in which the decree was passed, being in the objection a private individual and the suit in which the decree was passed a partner in the firm of Bhaggu and Maula Bakhsh. Consequently his petition to the lower Court, the order on which is now under appeal, must be looked upon as a claim preferred to or an objection made to the attachment of property attached in execution of a decree on the ground that such property is not liable to attachment under s. 278, Act X of 1877, and the order of the Court disallowing the claim or objection, as passed under s. 281, Act X of 1877. Such an order is

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not appealable under s. 588, Act X of 1877, but under s. 283, Act X of 1877, the party against whom the order is made, in this case the appellant, may institute a suit to establish his right to the property in dispute. The appeal is therefore dismissed with costs."

The judgment-debtor appealed to the High Court, contending that the Subordinate Judge's order was appealable.

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Mr. *Simeon*, for the respondent.

The judgment of the Court (STRAIGHT, J. and OLDFIELD, J.) was delivered by

STRAIGHT, J.—We think the Judge's view a correct one and this appeal must be dismissed with costs.

1882 *January 3.*

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield

SUKH NANDAN AND ANOTHER (PLAINTIFFS) *v.* RENNICK (DEFENDANT).*

Intestate—Sale of property of intestate in execution of decree against some of his heirs—Title to sale-proceeds—Letters of administration—Act X of 1865 (*Indian Succession Act*), *ss.* 190, 191.

S sued some of the heirs to a person governed by the Indian Succession Act, 1865, who died intestate, such heirs being in possession of a part of the estate of the deceased, for a debt due to him by the deceased, and obtained a decree against such persons. In execution of this decree property belonging to the deceased was sold. Before the sale-proceeds were paid to *S*, *R*, an heir to the deceased, obtained in the District Court letters of administration to the estate of the deceased, and an order for payment to her of such sale-proceeds. Thereupon *S* sued *R* for such sale-proceeds and to have the District Court's order directing payment thereof to her set aside. *Held* that, with reference to ss. 190 and 191 of the Indian Succession Act, 1865, the decree obtained by *S* against persons who did not legally represent the estate of the deceased, and the proceedings taken against such persons in execution of such decree, gave *S* no title to the sale-proceeds, which formed part of the estate of the deceased, and the suit was therefore not maintainable.

ONE George William Deridon died intestate, being at the time of his death indebted to the plaintiffs in this suit. Prior to any grant of letters of administration to the estate of the deceased under the Indian Succession Act, 1865, the plaintiffs brought a suit

* Second Appeal, No. 1126 of 1880, from a decree of W. C. Turner, Esq., Judge of Agra, dated the 6th April, 1880, affirming a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Agra, dated the 1st September, 1879.

against the brother and aunt of the deceased, who were in possession of a portion of his estate, to recover such debt, claiming against them as heirs to the deceased. They obtained a decree against these persons, in execution of which certain immoveable property belonging to the deceased was sold. On the 17th February, 1879, the Court executing the decree directed that a sum of Rs. 847 out of the sale-proceeds should be paid to the plaintiffs in satisfaction of the decree. In the meantime, on the 29th January, 1879, the defendant in the present suit, one of the heirs to the deceased George William Deridon, applied to the District Court for letters of administration to the estate of the deceased under Act X of 1865. On the 28th February, 1879, she applied for and obtained from the District Court an order directing that the sale-proceeds before mentioned should not be paid away until her application for letters of administration had been disposed of. On the 1st May, 1879, the District Court made an order granting her letters of administration and directing payment to her of the sale-proceeds. Thereupon the plaintiffs instituted the present suit against her to have the District Court's order of the 1st May, 1879, set aside, and to establish their right to have their decree satisfied from the sale-proceeds. Both the lower Courts held that the remedy of the plaintiffs was by appeal to the High Court from the District Court's order of the 1st May, 1879, and not by a separate suit.

In second appeal the plaintiffs contended that they were entitled to claim relief by suit.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Nand Lal*, for the appellants.

Mr. *Dillon*, for the respondent.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—It appears that George William Deridon died intestate, and after his death the plaintiffs sued his brother and aunt, in their representative character, and obtained two decrees dated 31st August, 1878, against them. The plaintiffs took out execution and attached and brought to sale certain moveable property forming part of the estate of the deceased and satisfied their

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decrees in part; they then obtained a certificate under Act X of 1877 to execute the decrees in the Court of the Munsif of Jalesar and attached and brought to sale some immoveable property, part of the estate, on the 20th December, 1878; the sale-proceeds amounted to Rs. 6,700 and the sale was confirmed on the 17th February, 1879, and the Munsif executing the decrees, on the same day, directed the officer who had conducted the sale to pay Rs. 847 to the plaintiffs to satisfy their decrees. This order was not carried out; and it appears that proceedings had previously been taken in the Agra Judge's Court, commencing 3rd September, 1878, by George Deridon, defendant, to obtain letters of administration for the estate of G. William Deridon deceased. He failed, however, in consequence of inability to give the required security, and Theresa Rennick, his sister, also a defendant, applied on the 29th January, 1879, in the Court of the Judge of Agra, for letters of administration, and on the 28th February, 1879, applied for and obtained an order that the proceeds of sale in the hands of the Collector should not be paid out until the matter of her application for letters of administration should be disposed of. She obtained letters of administration on 1st May, 1879, and an order from the Judge directing the payment of the sale-proceeds to her. On the 2nd May, 1879, the plaintiffs instituted this suit, in which they ask that the Judge's order dated 1st May, 1879, in respect of the payment of the sale-proceeds to Theresa Rennick be set aside and that they be allowed to satisfy their decree from the said sale-proceeds. The suit was dismissed by the Court of first instance on the ground that it could not be maintained with reference to the provisions of s. 263, Act X of 1865, which allow of an appeal to the High Court from orders made by a District Judge under the powers conferred by that Act, and the Judge, apparently regarding the suit as an appeal from an order made by a District Judge under the Indian Succession Act, has refused to entertain it. Whether or not the particular grounds on which the Courts have dismissed the suit are valid is immaterial in the view we take of the case, for on the admitted facts, which we have narrated, the plaintiffs' claim necessarily fails. The sale-proceeds which they seek to obtain to satisfy their decrees form part of the estate of G William Deridon, and the only person entitled to deal with them is

the properly constituted administrator of the estate, that is, the defendant Theresa Rennick. The plaintiffs' decrees, obtained against persons who did not represent the estate, and the proceedings in execution taken against them, can give no title to the property forming the estate. This is expressly declared by ss. 190 and 191 of the Act. We dismiss the appeal with costs.

Appeal dismissed.

1882
January 6.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

KHUSHALI (PETITIONER) *v.* RANI (OPPOSITE PARTY).*

Re-marriage of Hindu widow—Guardianship of children of deceased husband—Act XV of 1856, *s.* 3.

On the re-marriage of a Hindu widow, if neither she or any other person has been expressly constituted by the will or the testamentary disposition of the deceased husband the guardian of his child, and such child has property of his own sufficient for his support and education whilst a minor, such child should ordinarily be regarded as a child "who has neither father or mother" in the sense of s. 3 of Act XV of 1856, and in such a case a proper male relative of the deceased husband should ordinarily be appointed guardian of such child in preference to his re-married mother.

ON the re-marriage of a Hindu widow a male relative of her deceased husband applied to the District Court, under s. 3 of Act XV of 1856, to be appointed guardian of his minor son, alleging that the child had been ill-treated by the mother. The District Court refused the application, making the following order:—"The Court has discretion under s. 3 of Act XV of 1856 to appoint a guardian if it sees fit: in this case the petitioner Khushali has not shown cause why the child should not remain with its mother: the boy is only seven years old, and is quite unfit to form any opinion of his own, and has been obviously taught to tell the story of ill-treatment by his mother, which he told in Court: I therefore see no reason to appoint a guardian; the only objection raised to the mother being that she has married again, and it is against the rules of the caste for her to keep her son: the petitioner Khushali is the second cousin of the child, who I think will be better with its mother."

Khushali appealed from this order to the High Court, contending that, as the mother of the minor had re-married, a male relative

*First Appeal, No. 129 of 1881, from an order of W. Barry, Esq., Judge of Cawnpore, dated the 13th August, 1881.

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of her deceased husband ought, under s. 3 of Act XV of 1856, to be appointed guardian of the minor.

Babu *Oprokash Chandar Mukarji*, for the appellant.

Babu *Beni Prasad*, for the respondent.

The judgment of the Court (OLDFIELD, J. and TYRRELL, J.) was delivered by

TYRRELL, J.—The Judge has not sufficiently inquired into the facts of this case, and he does not appear to have rightly appreciated the bearing on it of the terms of Act XV of 1856. The mother of the minor a Hindu Sonar has re-married. It does not appear that the minor's father made her the guardian of his child, and it was suggested that property has been left which may be sufficient for the support and education of the child. Under these circumstances the Court would ordinarily regard the child, whose mother has been re-married, and has not the *veto* provided in the last portion of s. 3 of the Act, as a person "who has neither father nor mother" in the sense of that section. In such a case a proper male relative of the deceased father would presumably be the child's guardian in preference to his re-married mother; and the Court's power to appoint him, which is no doubt discretionary, should ordinarily be exercised failing good cause shown to the contrary. No such cause has here been shown, and the Judge improperly imposed on the paternal relative the burden of proof in this respect. The order of the Judge is annulled: and the case is remanded to the District Court for proper determination on its merits. The costs of this appeal will abide the result.

Cause remanded.

1882 *January* 10.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

HAR PRASAD AND ANOTHER (DEFENDANTS) *v.* BHAGWAN DAS (PLAINTIFF).*

Mortgage—First and second mortgagees—Purchase of mortgaged property by first mortgagee.

The first mortgagee of certain property purchased it at an execution-sale. The second mortgagee of such property subsequently sued the mortgagor and the

*Second Appeal, No. 552 of 1881, from a decree of J. Alone, Esq., Judge of the Court of Small Causes at Agra, with powers of a Subordinate Judge, dated the 19th February, 1881, modifying a decree of Pandit Kashi Narain, Munsif of Agra, dated the 29th July, 1880.

first mortgagee to enforce his mortgage, by the sale of such property. *Held* that the first, mortgagee was entitled to resist such sale, by virtue of being the first mortgagee, until his mortgage-debt was satisfied, and the fact that he had purchased the property mortgaged to him did not extinguish his mortgage, which must be held to subsist for his benefit. *Gaya Prasad* v. *Salik Prasad* (1) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—The facts of this case are as follows. Nazir Begam made a mortgage by deed dated the 7th June, 1870, in favour of Imrit Lal and Lalji Mal of two shops for Rs. 1,300. On the 1st December, 1872, she made a mortgage of five other shops for Rs. 1,000 to Imrit Lal and Lalji Mal, and on the 1st September, 1874, another mortgage for Rs. 1,500 of the same five shops, and again on the 21st January, 1878, another mortgage for Rs. 700 of the same shops to Imrit Lal and Lalji Mal. On the 13th March, 1879, Imrit Lal and Lalji Mal sub-mortgaged their rights as mortgagees under the deed of the 7th June, 1870, to Badri Das appellant for Rs. 1,200, and on the same date they sub-mortgaged their rights as mortgagees under the other deeds in the five shops to Har Prasad appellant for Rs. 2,800.

On the 16th January, 1880, Lalji Mal hypothecated under a bond for Rs. 598-9-6 his rights as mortgagee under the above deeds in respect of six shops to the plaintiff in this suit. On the 6th May, 1880, one Jid Mal brought to sale in execution of a money-decree Lalji Mal's right as mortgagee under the above deeds, and the appellants, Badri Das and Har Prasad, became the purchasers of those rights. The plaintiff has now brought this suit to recover the amount due to him under the bond dated 16th January, 1880, by sale of the interest which Lalji Mal had as mortgagee in the shops, and which the latter hypothecated to him, and he has impleaded Badri Das and Har Prasad, who it will be seen are the holders of a prior

(1) I. L. R 3 All. 682.

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mortgage from Lalji Mal of his interest as mortgagee, and who have since purchased that interest, and they set up their prior mortgage and purchase against the plaintiff's claim to sell the interest of Lalji Mal mortgagee.

The Court of first instance allowed the contention of Badri Das and Har Prasad, and dismissed that part of the claim. The Subordinate Judge has on the other hand decreed the claim to bring to sale the interest in suit, but subject to the prior charge which Badri Das and Har Prasad had on it. The latter persons have appealed to this Court, and we are of opinion that the decree of the Court of first instance should be restored.

The appellants are holders of a prior sub-mortgage from Lalji Mal of the interest which he had as mortgagee, and have since purchased that interest, and they are at liberty to resist a sale at the instance of plaintiff, a subsequent mortgagee, by virtue of their holding a prior mortgage, unless their mortgage-debt be first satisfied, and the fact that they purchased the interest mortgaged to them will not extinguish their mortgage, which must be held to subsist for their benefit after the purchase. In this view we are supported by the decision of this Court in *Gaya Prasad* v. *Salik Prasad* (1) where the question now raised was fully considered and determined. We allow the appeal with all costs, and restore the decree of the first Court.

Appeal allowed.

1882
January 10.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* PANCHAM.

Confession made to a Police officer—Act I of 1872 (*Indian Evidence Act*), *ss.* 25, 26, 27.

P, accused of the murder of a girl, gave to a Police officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had thrown down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the Police officer to the place where the girl's body had been found, and pointed out the anklets.

Held that such statements, being confessions made to a Police officer, whereby no fact was discovered, could not be proved against *P*.

(1) I. L. R., 3 All. 682.

Observations on the use of confessions made to Police officers.

Reg. v. *Jora Hasji* (1) and *Empress* v. *Rama Birapa* (2) referred to.

ONE Pancham, convicted by Mr. W. Duthoit, Sessions Judge of Allahabad, of the murder of a girl called Parugia, and sentenced to death, under an order dated the 31st October, 1881, appealed to the High Court. The appeal came for hearing before Stuart, C. J., and Brodhurst, J. It was contended before them, *inter alia*, that certain confessions made by the appellant while in the custody of the police had been used as evidence against him contrary to the provisions of s. 25 of the Indian Evidence Act, 1872. The learned Judges differed in opinion as to the propriety of the appellant's conviction, Stuart, C. J., being of opinion that it should be affirmed, while Brodhurst, J., was of opinion that it should be quashed on the ground that the evidence was insufficient for a conviction. In consequence of this difference of opinion the case was referred to Straight, J. For the purposes of this report, it is only necessary to set forth the judgments of Stuart, C.J., and Straight, J., so far as they relate to the question of the admissibility as evidence of the confessions above-mentioned. The judgment of Brodhurst, J., is not set forth, as that learned Judge did not decide that question.

Mr. *Colvin*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STUART, C.J.—On this subject we have first the evidence of Imam Ali, the head constable of Karari. He deposes, after explaining his finding on the 1st October the blood-stained clothes in Pancham's house: "On the 2nd October Pancham made a statement to the darogah and gave up this knife as the weapon with which the murder was committed. He took it out of his waistbelt and gave it to the darogah. This was in my presence. This was at 10 P.M. He also said that he had thrown down the anklets at the scene of the murder. As it was late at the time, he said he would point them out in the morning. On the 3rd October, soon after sunrise, he repeated this statement and conducted me and the sub-inspector and many other people to the *juár* field where I had

(1) 11 Bom. H. C. Rep. 242. (2) I. L. R. 3 Bom. 12.

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found the body, and there at 8 or 10 paces to the south from the place where it had been, and after a slight (search), produced from under the leaves, which were strewed about, these anklets." Now the fact thus deposed to of Pancham giving up a knife to the darogah in presence of the witnesses as the weapon with which the murder was committed is of course inadmissible as evidence against him proving a confession or admission of his guilt. But there are other things in this deposition which appear to me to be not only not excluded as evidence, but which come fairly within the meaning of s. 27 of the Evidence Act, by which it is provided that, "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved." This deposition is evidence therefore against the accused as proving that, on the 2nd October, he made a statement to the darogah and gave up a certain knife which he took out of his waistbelt; also as proving that he had thrown down the anklets at the scene of the murder: as it was late at the time, he said he would point them out in the morning; also as proving that soon after sunrise on the following morning the accused repeated his statement and conducted the witness and the sub-inspector and many other people to the *juár* field where the witness had found the body, and there at 8 or 10 paces to the south from the place where it had been, and after slight (search), produced from under the leaves, which were strewed about, the anklets. The deposition then of this head-constable, although not legal evidence of any confession, is I hold admissible as evidence of all the other circumstances referred to in it.

The next witness who speaks to a confession is Rameshur Dayal. This witness deposes that he questioned Pancham about the "silver things" and that Pancham "admitted that he had sent things for sale. But when I asked him whether they were the murdered child's ornaments, he remained silent. He admitted that he had sent silver for sale. He did not name any particular. This knife was produced by the accused from his waist and was given up by him to me on the 2nd October. I questioned him and told him to tell the truth, and he produced this knife and said this was the

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weapon used in the murder. He said he had thrown the anklets into the jungle and would point them out in the morning. Accordingly in the morning I and the head-constable and the villagers went to the jungle, conducted by the accused, and he searched and produced these anklets from under *juár* and other leaves. The place was 10 paces to the south of the place where the corpse had been found." Now all these statements, except as proving a confession of the murder, I hold to be admissible and relevant, not only under s. 27 of the Evidence Act, but also under s. 28, which expressly forms an exception to the law provided by s. 24. And even on general principles of evidence I hold that statements by a policeman going to prove such particulars as are referred to in this deposition are clearly admissible within the limits I have pointed out.

There are two other witnesses who speak to these admissions or confession, *viz*, Nadir Ali and Hurde. Nadir Ali is described as a *karinda* in Muhammadpur and other villages, and he evidently was one of the villagers referred to in the depositions of Imam Ali and Rameshur Dayal. He corroborates the evidence of these two policemen, and with respect to the accused's confession he says: "On Sunday night the accused made a statement about the murder in my presence and took out the knife from his waist and threw it down, saying it was the weapon with which the murder was committed." This is a very distinct statement, and if it could be taken as proceeding from the witness' own independent knowledge, it would be clearly admissible as evidence of a confession of guilt by the accused. But, although not a policeman, it is quite clear that this witness Nadir Ali speaks to the confession or admission made in his presence and hearing by Pancham to the two policemen, Imam Ali and Rameshur Dayal, and I consider that it falls within the prohibitive scope and meaning of s. 25 of the Evidence Act, and therefore I would exclude it as proving any admission or confession by Pancham. But in other respects this witness fully corroborates all the relevant evidence given against the accused by the two policemen. And I should add that the presence of the villagers along with the policemen at the *juár* field, when Parugia's body and the anklets were found, is a circumstance

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which still further favours the relevancy and admissibility of that evidence in other respects than as proving a confession or admission by Pancham of his guilt, showing as it does that what Pancham did say was said freely and without any compulsion.

The other witness is Hurde. This man also is not a policeman but a cultivator of Muhammadpur and generally is in the same position as to his knowledge of the case as the last witness referred to, Nadir Ali. As his evidence appears to be taken down by the Judge at the trial, he might almost be supposed to speak of Pancham's confession as from his own knowledge; but he probably meant no more than what he stated before the Magistrate, and it simply amounts to this, that he was present when the accused was questioned by the darogah as deposed to by Imam Ali and Rameshur Dayal; in fact, he appears to have been one of those villagers mentioned by the two policemen as being present when the search was made by them in the *juár* field for Parugia's body and the anklets. These four depositions, *viz.*, of Imam Ali, Rameshur Dayal, of Nadir Ali and of Hurde, form the material statements to be found on the record with respect to Pancham's confession or admission of his guilt, and so far as they are relevant, they are admissible to the extent I have explained, *viz.*, as proving all the facts to which they refer, saving and excepting any express admission or confession on the part of Pancham. To every other effect they must in my opinion be weighed and considered, and so viewed, they appear to me very clearly to corroborate the other evidence I have examined as to the fact of the murder and of Pancham's guilt.

I might stop here, but I think I should say a word or two respecting the authorities that were referred to at the hearing in behalf of the accused. These were two cases heard and determined in the High Court of Bombay by West, J. and Pinhey, J. But so far as I understand them, they go to support the view of the law I have laid down. This is clearly so with respect to the case of *Reg.* v. *Jora Hasji* (1), where West, J., in delivering judgment, appears to have substantially expressed himself to the same effect as I have done in this case, showing that evidence proving a confession to a policeman is not wholly to be excluded, but may be referred to as proving other relevant facts detailed in it. The other Bombay

(1) 11 Bom. H. C. Rep. 242.

case, before the same Judges, that of *Empress* v. *Rama Birapa* (1), appears to be very much to the same effect, although the facts are very different from the present case, and the law laid down is, to my apprehension, a little obscure.

I should add that on this subject of the exclusion or admissibility of confessions made to a police officer, nothing can be more unreasonable, and I may add unjust, than the hard and fast line that is often attempted to be drawn in this country. S. 25 of the Evidence Act no doubt provides that "no confession made to a police officer shall be proved against a person accused of any offence." Now if this is meant to apply to all statements however voluntarily made to a police officer, nothing could be more impolitic or obstructive, and I trust that this provision is not to be understood in any absolute sense and under all circumstances whatever. It ought to be read and understood in connection with the other sections which follow it, particularly s. 28, for taken by itself and applied indiscriminately it is simply irrational and absurd. Such a naked application of the section is also plainly opposed to the law of evidence as applied by the Courts in England, a good illustration of which is supplied by what is called *Baldry's Case* as referred to in Roscoe's Evidence in Criminal Cases, 4th edition, by Power, 1858, p. 40. There we are told that "all the authorities upon this point (the prisoner's confession) were brought before the Court of appeal in the argument of the prisoner's counsel. The confession, which that Court unanimously held to have been rightly received in evidence at the trial, was made to the police constable, who, having apprehended the prisoner on a charge of murder, said to him that 'he need not say anything to criminate himself, as what he did say would be taken down and used as evidence against him,' and thereupon the prisoner made the confession." In this country I daresay it might be fairly argued that such a confession as was made in *Baldry's Case* did not come within the implied exceptions to s. 24, and was distinctly struck at by s. 25, however unreasonably. But I have no doubt in my own mind that statements by police officers embodying and including what may be understood as a confession or admission of guilt by an accused person are not wholly in-

(1) I. L. R 3 Bom. 12.

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admissible, but may be received and applied so far as they prove merely corroborative circumstances and not an absolute confession of guilt.

STRAIGHT, J.—(After discussing the facts and concurring in the conclusions arrived at on them by the Chief Justice, continued:) I have only one other matter upon which to remark. The learned Chief Justice in the course of his judgment, no doubt having in his mind certain arguments used by the counsel for the appellant at the hearing of the appeal, has made some remarks in reference to the admissibility of certain portions of the evidence of Rameshur Dayal, Imam Ali, Nadir Ali and Hurde, which detailed statements made by the appellant with regard to the knife and the anklets. I need only remark that, in my opinion, those statements amounted to confessions; that they were made to the police; that no fact was discovered in consequence of any information derived from such statements within the meaning of the proviso contained in s. 27 of the Evidence Act; consequently I consider that the proof of them was wrongly received, in contravention of the prohibition of s. 25 of the Evidence Act. As to the statement made by the appellant with respect to the knife, that is an obvious confession, and his remarks about the anklets bear a like construction. But with regard to these latter, it is obvious that the anklets were not discovered in consequence of what he had said, for on the contrary the appellant himself went with the police and pointed out the spot where they were lying. In short it was by his own *act*, and not from any *information* given by him, that the discovery took place. It seems to me that the obvious intention of the Legislature in passing the provisions contained in ss. 25 and 26 of the Evidence Act was to deter the police from extorting confessions, by rendering such confessions absolutely inadmissible in proof, unless made in the immediate presence of a Magistrate. It is manifest that the prohibition laid down in these two sections must be strictly applied, and any relaxation of it in accordance with the proviso to s. 27 should be sparingly admitted, and only to the extent of so much of the accused's statement as directly and distinctly relates to the fact alleged to have been discovered in consequence of it.

APPELLATE CIVIL.

1882
January 3.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

NASRAT HUSAIN (PLAINTIFF) *v.* HAMIDAN AND OTHERS (DEFENDANTS).

Muhammadan Law—Husband and wife—Shia—Sunni—Suit for recovery of wife—Dower.

A woman of the Sunni sect of Muhammadans marrying a man of the Shia sect is entitled to the privileges secured to her married position by the law of her sect, and does not thereby become governed by the Shia law.

Held, therefore, where a husband sued to recover his wife, the one being a Shia, and the other a Sunni, that, the wife's dower being "exigible" dower, and not having been paid, the suit was not maintainable under Sunni law.

THE plaintiff in this suit, a Muhammadan of the Shia sect, claimed to recover possession of his wife, the defendant Hamidan, with whom he had cohabited for some years. The latter, who was a Sunni, set up as a defence to the suit that the plaintiff had not paid her her dower, amounting to Rs. 5,000, and until he did so, the suit was not maintainable; and that the plaintiff was a person of immoral and violent character, and had treated her with cruelty, and she was in apprehension of danger to her life if she returned to him. The plaintiff asserted that the defendant's dower was Rs. 500, and the same had been paid to her, and denied that he had been guilty of cruelty to her. The Court of first instance framed the following, among other, issues for trial, *viz.*, "Was the dower of the defendant Hamidan Rs. 500, and has that sum been paid to her, or was it Rs. 5,000, and has that sum been paid to her, and in the latter event, is the claim for possession of the defendant Hamidan valid?" and "What is the plaintiff's public and private character, and how did he cohabit with the defendant Hamidan, and whether, with reference to his conduct towards her, she should be compelled to live with him or not?" The Court of first instance, as regards the first issue, decided that the defendant's dower was Rs. 5,000, that it was exigible and not deferred dower, and that it had not been paid to her; and, following the law governing the Sunnis, held that under these circumstances the plaintiff's suit was not maintainable. As regards the second issue, the Court decided that

* Second Appeal, No. 628 of 1881, from a decree of R. M King, Esq., Judge of Sahâranpur, dated the 10th January, 1881, affirming a decree of Maulwi Nasr-ul-lah Khan, Munsif of Sahâranpur, dated the 5th November, 1880.

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the defendant's life would be endangered were she to return to the plaintiff, and it therefore held that she could not be compelled to return to him. In accordance with its decision on these issues the Court dismissed the suit. On appeal by the plaintiff the lower appellate Court affirmed this decree.

On second appeal to the High Court it was contended that the law governing Sunnis should not have been applied in this case, but that governing Shias.

Pandit *Nand Lal* and Munshi *Kashi Prasad*, for the appellant.

Mr. *Conlan*, Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Shah *Asad Ali*, for the respondents.

The judgment of the Court (BRODHURST, J. and TYRRELL, J.) was delivered by

TYRRELL, J.— The pleas in appeal fail. It is found as a fact that the respondent is a Sunni, and as such she is entitled to the privileges secured to her married position by the law of her sect. No authority has been cited to us for the theory that a Sunni woman contracting marriage with a Shia becomes thereby governed by the Shia law. Apart from these legal considerations, we see no reason for disturbing the decrees of the Courts below on the merits. The respondent made out a case for protection against proved risk to her personal health and safety, and we are satisfied that the Courts below have rightly exercised their discretion in refusing the plaintiff the relief he claimed. The appeal is dismissed with costs.

Appeal dismissed.

1882
January 16.

Before Mr. Justice Straight and Mr Justice Tyrrell.

MATHURA DAS AND OTHERS (PLAINTIFFS) *v.* MITCHELL AND ANOTHER (DEFENDANTS)

Registration—Unregistered conveyance—Bond confirming conveyance—Registration of conveyance instead of bond—"Defect of procedure"—Act III of 1877 (*Registration Act*), *ss.* 58—60, 87—*Claim to attached property—Suit to establish judgment-debtor's right—Burden of proof.*

A decree-holder sued to establish that certain property was the property of *B* his judgment-debtor, such property being claimed by *A* as his. He proved that

* First Appeal, No 14 of 1881, from a decree of J. H Prinsep, Esq , Judge of Cawnpore, dated the 9th September, 1880.

for five years and more *W* had been in possession of such property as ostensible owner. *Held* that, this being so, it rested with *A* to prove his title.

A deed of sale, which required to be registered, not having been registered, and the time for presenting it for registration having expired, the vendor, in order to avoid the effect of the deed of sale being unregistered, gave the purchaser a bond confirming such deed. The bond, with the deed of sale annexed thereto, was presented for registration By mistake or for some other reason the particulars to be endorsed on a document admitted to registration, and the certificate showing that a document has been registered, were endorsed on the deed of sale and not on the bond

Held that, assuming that the bond had been registered, it was doubtful whether such an obvious attempt to defeat the provisions of the Registration Law should be permitted to succeed; that, whether there had been a mistake and the certificate of registration really applied to the bond or not, the provisions of ss. 58, 59, and 60 of the Registration Act had not been complied with, and the bond was to all intents and purposes unregistered; and that the defect was not a "defect of procedure," within the meaning of s 87, and which could be passed over.

THE plaintiffs in this suit claimed a declaration that a "screw house" situate at Cawnpore was the property of the defendant W. Mitchell, and liable to be sold in execution of a decree for money held by them against him. The plaintiffs had caused this property to be attached in execution of their decree against W. Mitchell. The defendant A. Mitchell, father of W. Mitchell, had objected to the attachment, claiming the property as his own, by virtue of a deed of sale executed in his favour by Messrs. Nicol Fleming & Co. on the 25th September, 1873. His objection was allowed, and thereupon the plaintiffs brought the present suit. They alleged that the property belonged to W. Mitchell, and the sale under which A. Mitchell claimed was fictitious and collusive, and invalid, having been made without consideration. The deed of sale dated the 25th September, 1873, was not registered. On the 31st December, 1878, Messrs. Nicol Fleming & Co. executed a bond in favour of A. Mitchell confirming the deed of sale. This bond recited that it was executed in consideration of the fact that the deed of sale "was never registered in accordance with the provisions of the Indian Registration Act." On the 25th March, 1879, the bond was presented for registration, the deed of sale being annexed thereto. The particulars to be endorsed on a document admitted to registration, and the certificate showing that a docu-

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ment has been registered, were endorsed by the registering officer on the deed of sale. There was no reference in such endorsements to the bond. No endorsements were made on the bond. The District Judge of Cawnpore, by whom the suit was tried, framed the following, among other, issues for trial :—" Who is the owner of the disputed property?" " Is the conveyance to A. Mitchell a *bonâ fide* transaction for consideration paid, or was the deed relating thereto collusively and fraudulently executed, and registration effected in an illegal manner." The District Judge decided these issues in favour of the defendant A. Mitchell, and dismissed the suit. Upon the question as to the admissibility in evidence of the deed of sale, the Judge observed as follows :—

" Objection is taken to the registration as being informal, and hence the instrument itself is inadmissible in evidence : the question is, was the registration of both instruments necessary or not: there is no question of the first indenture being useless by itself; the time for presentation to register it, even upon payment of fine, has long since expired ; but there is no reason why the second instrument should not be received, if the requirements of the stamp law relating thereto have been fulfilled: this instrument being in confirmation and of same import as the first one, but without the details set forth therein, the two papers form one whole, the registration of which relates to the indenture of the last date, which being within time is receivable in evidence : it is argued by plaintiff's vakil that the certificate of registration being endorsed on the first instrument, which is proved to be inoperative, the registration has not been according to law, and the deed is therefore invalid : reference is made to the High Court's ruling in *Sah Koondun Lall* v. *Makhun Lall* (1) and *Mahomed Altaf Ali Khan* v. *Pertab Singh* (2) as to the necessity of a document being registered in accordance with the provisions of the Registration Act ; the Privy Council's remarks in the special appeal brought before them by *Makhun Lall*, in the first of those cases, are also adverted to, as setting forth the procedure to be observed under ss. 22, 24, 26, 49 and 88 of Act XX of 1866, the law then in force, but neither has there been a departure from the law

(1) N.-W. P. H. C. Rep. 1869, p. 168. (2) N.-W. P. H. C. Rep. 1873, p. 91.

in the mode of registration, inconsistent with its obligations, nor do the precedent rulings apply to the present case, because of the want of analogy in the features of their exemplars: in *Sah Koondun Lall's* case the registering officer acted irregularly in proceeding of his own authority to register in the absence of persons whose presence was necessary for the due registration of a deed; and upon the same principle, *viz.*, that the deed had not been registered by the persons executing the document, the registration in the case of *Mahomed Altaf Ali Khan* was pronounced to be irregular and invalid.

"In the present case now before the Court, the defect is purely one of procedure; the certificate of registration should, it is contended, have been attached to the indenture of the 31st December, 1878, and not to its annexure, which gives the coloring of registration to the instrument of 1873, which is allowed to be inoperative: the objection is more specious than real; a glance at the document of the 31st December, 1878, discloses the want of room for the endorsement; and looking upon the two documents as part and parcel of one whole, there was plenty of room on the last page of the whole, and upon it therefore the required certificate was written: I fail to see in this any irregularity in writing the registration; moreover by s. 87, Act III of 1877, the law now in force, nothing done in good faith by any registering officer invalidates the registration by reason of a defect in procedure or appointment; the mode adopted is not a defect in procedure, if the two documents are susceptible of being treated as one."

The plaintiffs appealed to the High Court.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Oprokash Chandar Mukarji*, for the respondents.

The judgment of the Court (STRAIGHT, J. and TYRRELL, J.) was delivered by

STRAIGHT, J.—This is an appeal from a judgment of the Judge of Cawnpore, dated the 9th September, 1880, under the following circumstances. The plaintiffs-appellants on the 11th June, 1879, obtained a money-decree for Rs. 2,036-5-0 against the defendant

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respondent William Mitchell, upon the basis of an arbitration award. In execution a screw-house situate in Collectorganj, Cawnpore, was attached as the property of the judgment-debtor, and thereupon the defendant-respondent Alexander Mitchell filed objections on the ground that the premises in question were his property, and that William Mitchell was his tenant. The contention was successful, and on the 11th August, 1879, an order was passed in the miscellaneous department under s. 280 of the Civil Procedure Code releasing the attachment. Hence the present suit, which is for a declaration that the screw-house referred to is the property of William Mitchell and liable to execution and sale at the instance of the plaintiffs. The Judge found that the premises did not belong to William Mitchell, and that they had been acquired by purchase in September, 1873, by Alexander Mitchell. He therefore dismissed the plaintiffs' claim and they now appeal. Their pleas in substance are that the decision of the Judge was against the weight of evidence, and that he wrongly admitted certain documents in proof, which were inadmissible. The respondents have also filed objections to the order of the lower Court as to costs, and the scale upon which it directed the pleaders' fees to be assessed.

The question for us to determine is, whether the screw-house in suit was or was not the property of William Mitchell at the time of its attachment by the plaintiffs, and in considering this point it will of course become necessary to decide upon the legitimacy or otherwise of the claim set up by Alexander Mitchell. We start with this fact at least certain, that from the end of 1873 or the beginning of 1874 down to the time of the plaintiffs' attachment, William Mitchell was in occupation of and carrying on his business at the premises in question, to all external appearances as the proprietor and owner. Having established this lengthened possession on the part of their judgment-debtor, the plaintiffs reasonably enough contend that they have made out a *primâ facie* case, which it lies upon the defendants to rebut. We think that this is the correct view of the position, and that it rests with Alexander Mitchell to prove his title. This he seeks to do in a fashion, which is to say the least of it extraordinary. He produces two

documents, one purporting to be a deed of conveyance of the screw house to himself, dated the 25th September, 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March, 1879, it was presented to the Collector for registration. Now even supposing registration had been formally and properly completed, we should have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischiefs at which this branch of legislation is aimed. But as a matter of fact the confirming bond of the 31st December, 1878, never has been registered, whereas that of the 25th September, 1873, contains the registration certificate. It is said on the part of the defendants that this is a mistake, and that the certificate in reality applies to the document of December, 1878. All we can say to this is that the provisions of ss. 58, 59 and 60 of Act III of 1877 have not been complied with, and that the instrument remains to all intents and purposes unregistered. We cannot regard this as such a "defect in procedure" as is contemplated by s. 87, and one which we can pass over. We therefore think that neither of the documents mentioned was admissible in evidence, and that in admitting that of December, 1878, in proof, the Judge decided erroneously. Then the question arises, whether failing the written evidence of his title, Alexander Mitchell can be permitted to prove it *aliunde*. If we were rigidly to apply the strict rules of law, we should say, "no" but in order effectually and conclusively to dispose of the suit, we think it best to consider such facts as there are in evidence, and to pass a decision upon them. (The judgment then proceeded to dispose of the case on the merits.)

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January 16.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* KAMTA PRASAD.

Security for keeping the peace—Magistrate of the District—Appellate Court—Act X of 1872 (Criminal Procedure Code), s. 489.

The Magistrate of a District, when exercising the powers of an Appellate Court, is competent to make an order under s. 489 of the Criminal Procedure Code requiring the appellant to furnish security for keeping the peace.

ONE Kamta Prasad and two other persons were convicted by a subordinate Magistrate at Cawnpore of voluntarily causing hurt, an offence punishable under s. 323 of the Indian Penal Code, and were severally sentenced to one week's rigorous imprisonment. They appealed to the Magistrate of the District, Mr. J. W. Cornwall, who affirmed the convictions, directing, as regards Kamta Prasad, that on the expiration of his sentence he should be brought up to enter into his own recognizances of Rs. 100, and to give two sureties of Rs. 50 each, to keep the peace for one year, and in default be simply imprisoned for one year. The Sessions Judge of Cawnpore, Mr. W. Barry, being doubtful whether a Magistrate of the District, acting as a Court of appeal, has power to call upon the appellant to furnish security for keeping the peace, referred the case to the High Court for orders.

The case was laid before Stuart, C.J., and Brodhurst, J., and the question submitted by the Sessions Judge was referred by those learned Judges to the Full Bench, their orders being as follows:—

BRODHURST, J.—The point of law that has been referred by the Sessions Judge of Cawnpore is whether "the Magistrate of the District, as an appellate Court, can lawfully, under ss. 280 and 489 and 490, Criminal Procedure Code, in a case of hurt, call upon the appellant to give security and find sureties to keep the peace."

I concur with the Judge that "such an order cannot be called a punishment or enhanced punishment within the meaning of s. 280, Criminal Procedure Code," for the punishments there referred to are only those to which offenders are liable under s. 53,

Indian Penal Code, *viz.*, death, transportation, penal servitude, imprisonment—rigorous and simple—forfeiture of property, fine, and whipping. Although it is not actually stated in ss. 489 and 490, Criminal Procedure Code, that an appellate Court is empowered to require personal recognizance and security to keep the peace, yet that it is thus empowered is, I think, to be inferred from the whole tenor of these sections; and more especially so, first, from the wording of cl. 2, s. 489; secondly, from the reference in cl. 3 to the High Court; and, thirdly, from the last clause of the section. The wording of cl. 2, *viz.*, "the Court or Magistrate by which or by whom such person *is convicted, or* the Court or Magistrate by which or by whom *the final sentence or order in the case is passed*, apparently refers to a Court of Session or Magistrate of a division of a District, or Magistrate of the first class, both in its or his original and appellate jurisdiction. The powers conferred upon the High Court under the two sections seem also to relate to its appellate jurisdiction, for there is a special Act "to regulate the procedure of the High Courts in the exercise of their original jurisdiction," and, moreover, in this Act there is a chapter headed "Of security for keeping the peace." The last clause of s. 489 also appears to me to apply to a case such as that under notice, in which a report for recognizance and security to keep the peace was not submitted, under the last clause but one of the section, by the Magistrate of the third class who signed the judgment, but an order on the subject was subsequently added by the Magistrate of the District when disposing of the case on appeal.

I may also observe that, admitting that the Deputy Magistrate has in his decision stated the facts of the case correctly, he has shown good cause why he should have reported the case to the Magistrate of the District to take recognizance and security from Kamta Prasad. The Magistrate, in disposing of Kamta's appeal, might, under s. 280, Criminal Procedure Code, have enhanced that appellant's sentence from one week to one year's rigorous imprisonment and fine, *i. e.*, he might have enhanced the punishment by more than fifty times; and under these circumstances it would be anomalous if a Magistrate of a District might not, in disposing of such an appeal, rectify the omission of his

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inexperienced subordinate by passing orders upon the appellant under ss. 489 and 490, Criminal Procedure Code.

For the reasons above mentioned, I consider that in an appeal from a conviction for any offence specified in cl. 1, s. 489, Criminal Procedure Code, the appellate Court is competent to require the appellant to give a personal recognizance under s. 489, and security under s. 490, Criminal Procedure Code, to keep the peace; but as the law on this point is not as clear as is desirable, and as the matter at issue has not, so far as I am aware, ever been disposed of by any High Court, I think a reference on the subject may advantageously be made to the Full Bench for the authoritative ruling that has been solicited.

STUART, C.J.—This is a case reported to us by the Judge of Cawnpore for revision, and the question for our consideration relates to the validity of the order made by the Magistrate in the appeal to him from the order of the convicting Deputy Magistrate; in other words, whether the order passed by the Magistrate in his appellate capacity was or was not within his powers.

The first Court convicted all of the three accused, and sentenced each of them to be rigorously imprisoned for one week. But on appeal to the Magistrate he expressed the opinion that the evidence was insufficient to justify the conviction of two of the accused, and he remitted the unexpired portion of their sentence. But in regard to the third prisoner, one Kamta, he upheld the conviction and ordered him to undergo the remainder of his sentence, adding, "and at its close he will be brought up to enter into his own recognizance of Rs. 100, and to give two sureties of Rs. 50 each, to keep the peace for a year, and in default be simply imprisoned for one year." This is the order the legality or illegality of which has to be considered and determined.

I incline to the opinion that in making this order the Magistrate acted within his powers under ss. 489 and 490, Criminal Procedure Code, but as the question is attended with some doubt and difficulty, I would refer the case to the Full Bench of the Court. It will be observed that in making this order the Magistrate acted as an appellate Court, and there is no express provision to be found in these sections relating to appeals or to the powers or

jurisdiction of an appellate Court as such. It may, however, I think, be very reasonably inferred from the terms of ss. 489 and 490 that they were intended to apply to orders in appeal as well as to other proceedings after trial and conviction. The 2nd clause of s. 489 provides not only for personal recognizance being ordered by a Court or Magistrate before whom an accused person is *convicted*, but also by the Court or Magistrate by which or by whom "the final sentence or order in the case is passed;" and the allusion to the High Court in the 3rd clause of the section seems to show that it is the High Court exercising a jurisdiction other than its original jurisdiction which is there intended, for the procedure of the High Court on its original side in criminal cases is separately provided for by Act X. of 1875: and there is a Full Bench ruling of this Court—*Empress* v. *Muhammad Jafar* (1)—decided on the 9th March, 1881, by which it was held that the Court could make orders under s. 489 in revision. But, although the terms of s. 489 appear to be wide enough for including any proceeding by way of appeal or revision in any Court having appellate jurisdiction, the word "appeal" or the words "order in appeal" are not expressly mentioned in any part of the section.

S. 46 of the Criminal Procedure Code should also not be left out of consideration in such a case. By that section subordinate Magistrates who cannot pass a sufficiently severe sentence may submit the case to the Magistrate above them, who, after considering the case, may pass a proper sentence or order; and it may, I think, be fairly argued that Magistrates so acting may also make orders under ss. 489 and 490, although the procedure under s. 46 is very special and even exceptional, for it is neither by way of appeal nor by revision, but rather by way of re-trial on the merits. Allusion was made at the hearing to s. 280 of the Criminal Procedure Code, but that section only applies where the punishment awarded is such as can be "enhanced;" and it appears to me that the order for recognizance made by the Magistrate in the appeal to him cannot be so described, and that, therefore, s. 280 has no application. The case in all its aspects appears to me a fit one for determination by a Full Bench ruling.

(1) I. L. R., 3 All. 545.

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The Full Bench delivered the following judgment:—

STRAIGHT, J. (STUART, C. J., OLDFIELD, J., BRODHURST, J., and TYRRELL, J., concurring).—We are of opinion that the views expressed by the Division Bench referring the case were correct, and that the order of the Magistrate of the District, passed under s. 489 of the Criminal Procedure Code, was a legal and proper one. The Sessions Judge may be informed accordingly.

1882 January 17.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* JALLU.

Court-fee stamps—Sale by unlicensed person—Act XVIII of 1869 *(General Stamp Act), s.* 48*—Act VII of* 1870 *(Court-Fees Act), s.* 34*—Act I of* 1879 *(General Stamp Act), s.* 68.

The sale of Court-fee stamps without a license is not an offence.

ONE Jallu was convicted by Mr. C. Rustomjee, Magistrate of the first class, Ghâzipur, by an order dated the 20th June, 1881, "under s. 48 of Act XVIII of 1869, as amended by s. 34 of the Court-Fees Act, 1870," for selling court-fee stamps without authority. The Sessions Judge of Ghâzipur, Mr. J. W. Power, being of opinion that the conviction was illegal, the unlicensed sale of court-fee stamps not being an offence, referred the case to the High Court for orders. The case was laid before Oldfield, J., and was referred by that learned Judge to the Full Bench.

The following judgment was delivered by the Full Bench:—

OLDFIELD, J., (STUART C. J., STRAIGHT, J., BRODHURST, J., and TYRRELL, J., concurring).—Jallu, who is a person not appointed to sell court-fee stamps, has been convicted under s. 48 of Act XVIII of 1869 (General Stamp Act) for selling court-fee stamps; and apart from the circumstance that Act XVIII of 1869 has been repealed and the conviction is technically wrong, we are of opinion that he has not committed a penal offence.

S. 48 of the Act of 1869 enabled the Local Government, with the approval of the Governor-General-in-Council, to frame rules for regulating the sale of stamps and stamped papers required by the Act or by Act XXVI of 1867, and for determining the persons by whom such sales were to be conducted, and for fixing their remuneration,

and the rules so made had the force of law; and the section provided a penalty for wilful disobedience of any rule on the part of any person appointed to sell such stamps or stamped papers; and it was enacted by s. 34, Court-Fees Act (VII of 1870), that in the General Stamp Act, 1869, s. 48 shall be read as if for the words and figures "Act XXVI of 1867" (to amend the law relating to stamp duties), the words and figures "the Court-Fees Act, 1870," were substituted. S. 27, Court-Fees Act, also empowered the Government to make rules for the supply of stamps.

The rules made under the provisions of s. 48 of the General Stamp Act, and ss. 34 and 27, Court-Fees Act, were published in the Gazette dated the 27th April, 1878.

The General Stamp Act, 1869, was repealed by Act I of 1879, which is now in force; but by s. 2 of this Act all rules made under the Act of 1869 are, so far as consistent with the Act, to be deemed to have been made under it; and by s. 68 a penalty has been provided, not only for wilful disobedience of any rule relating to sale of stamps on the part of a person appointed to sell stamps, but also for the sale of stamps by a person not so appointed.

No doubt, with reference to s. 2 of the Act, the rules published in the Gazette dated the 27th April, 1878, for the sale of court-fee stamps are still in force, but those rules do not and cannot of themselves make the sale of court-fee stamps penal, and assuming that the effect of s. 34 of the Court-Fees Act was to extend the penalty provided by s. 48 of the Act of 1869 to wilful disobedience of rules by a person appointed to sell court-fee stamps, that Act has now been repealed, and s. 34, Court-Fees Act, had not nor could it have the effect of rendering penal the sale of stamps by a person not so appointed, which is the case before us, since that is an act which for the first time was made an offence by s. 68, Act I of 1879, with reference to the sale of stamps under that Act only, and was not punishable under s. 48 of the Act of 1869, to which s. 34 of the Court-Fees Act had application. The conviction and sentence are set aside.

Conviction quashed.

1882.
January 17.

Before Sir Robert Stuart, Kt., Chief Justice, Mr Justice Straight, Mr Justice Oldfield, Mr Justice Brodhurst, and Mr Justice Tyrrell

NATH PRASAD (PLAINTIFF) *v* RAM PALTAN RAM AND OTHERS (DEFENDANTS).*

Share of undivided mahál—Conditional sale—Pre-emption—Limitation—Act XV of 1877 (*Limitation Act*), *sch.* ii, *Nos.* 10, 120.

The limitation applicable to a suit to enforce a right of pre emption in respect of a conditional sale of a share of an undivided mahál is that contained in art. 120, sch. ii of Act XV of 1877, *viz*, six years.

THIS was a reference to the Full Bench by Straight, J., and Oldfield, J., of the following question arising in this appeal:—

"What is the limitation applicable to a suit by a pre-emptor to enforce his right against the vendor and vendee under a registered deed of conditional sale relating to a fractional share of an undivided mahál?"

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The Full Bench delivered the following judgment:—

STRAIGHT, J. (STUART, C. J., OLDFIELD, J., BRODHURST, J., and TYRRELL, J., concurring) —We are very clearly of opinion that art. 10, sch. ii of the Limitation Act of 1877 has no application to a suit by a pre-emptor in respect of a conditional sale of a fractional share of an undivided mahál. It has already been held by a Full Bench of this Court (1) that such an interest is incapable of physical possession under an ordinary contract of sale, and this ruling is of course equally applicable to the question involved in the present reference.

The alternative date mentioned in the third column of art. 10 cannot in our judgment be applied to a transaction of conditional sale, which has about it all the characteristics of a mortgage, and further requires the intervention of the machinery of foreclosure before the vendee can acquire a proprietary title. We think that the sale referred to in art. 10 must be an absolute one, having

* Second Appeal, No. 569 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 4th February, 1881, affirming a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 9th November, 1880.

(1) *Unkar Das* v. *Narain*, I. L. R., 4 All. 24.

immediate effect and operation, in those cases where the interest passed is capable of physical possession, by physical possession, and where it is not, by the creation of a title under an instrument duly registered. We are aware that, in removing conditional sales from the category of art. 10, that failing any special provision to govern them, we relegate them to art. 120. We fully realize the anomalies that must thus necessarily arise, by giving the pre-emptor objecting to a conditional sale that has become absolute a limitation of six years; and in those cases where the *wajib-ul-arz* creates a right of pre-mortgage, two causes of action with a similar period in respect of each. But it appears to us that the Legislature overlooked this form of contract, when providing for the exercise of the right of pre-emption, and has consequently left cases of the kind mentioned in the order of reference unprovided for. Our answer must therefore be that the limitation applicable to a suit by a pre-emptor to enforce his right against the vendor and vendee, under a registered deed of conditional sale relating to a fractional share of an undivided mahál, is that contained in art. 120, namely six years.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

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January 18.

QURBAN ALI (PLAINTIFF) *v.* ASHRAF ALI (DEFENDANT).*

Act X of 1877 (*Civil Procedure Code*), *s.* 276—*Award directing execution of conveyance—Decree in accordance with award—Execution of conveyance—"Private alienation"*

By agreement between *L* and *Q*, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that *L* should transfer certain property to *Q* by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against *L*. After the attachment *L*, in compliance with the decree made in accordance with the award, executed a conveyance of such property to *Q*.

Held by the Full Bench (affirming the decision of STRAIGHT, J., and reversing that of SPANKIE, J.,) that such conveyance was not a "private alienation" in the sense of s. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment.

QURBAN ALI, the plaintiff in this suit, on the 1st March, 1878, instituted a suit against one Lachman Das for certain moneys.

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* Appeal under s. 10 of the Letters Patent, No. 5 of 1881.

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The matters in difference in this suit were referred by the Court trying it to arbitration. On the 4th June, 1878, the arbitrators made an award directing that Lachman Das should pay Qurban Ali Rs. 35,095, and that Rs. 9,200 of that sum should be paid in manner following, *viz.*, that Lachman Das should, within fifteen days after the confirmation of the award, execute in favour of Qurban Ali a deed of sale of an eight and a half biswas share of a village called Mora, in lieu of Rs. 5,000, of a decree for Rs. 1,700 held by him against a Major Denehy, and of a bond for Rs. 1,500, given him by one Parshadi Lal, and that such share should remain hypothecated until the execution of such deed. The Court trying this suit made a decree in accordance with the award on the 20th June, 1878. On the 28th June, 1878, Lachman Das executed the deed of sale, and on the 2nd July the deed was registered. In the meantime, on the 21st May, 1878, one Biba Jan had obtained a decree for money against Lachman Das. On the 3rd June following she applied for the attachment and sale of a moiety of the share above-mentioned, and the same was attached on the 10th June. Qurban Ali objected to the sale, claiming the property by virtue of the deed of sale of the 28th June, but his objections were disallowed, and the property was put up for sale on the 20th July, and was purchased by Ashraf Ali, the defendant in this suit. Thereupon Qurban Ali instituted the present suit against Ashraf Ali to have the auction-sale of the property of the 20th July, 1878, set aside and for possession thereof, claiming by virtue of the deed of sale of the 28th June, 1878. The defendant set up as a defence to the suit, *inter alia*, that the sale to the plaintiff was void, under the provisions of s. 276 of Act X of 1877, as against his claim as auction purchaser, as such sale had been made after the attachment of the property in execution of Biba Jan's decree. Both the lower Courts allowed this defence and dismissed the plaintiff's suit.

On second appeal the plaintiff contended that the sale to him was not void under the provisions of s. 276 of Act X of 1877. The learned Judges (SPANKIE, J., and STRAIGHT, J.,) of the Division Bench which heard the appeal differed in opinion on the question raised by the plaintiff's contention. The following judgments were delivered by them:—

SPANKIE, J.—The facts of the case are clearly set out in the judgments of the Courts below.

I am not prepared to say that the view taken in those judgments is wrong. The words "private alienation" in s. 276 of Act X of 1877 were probably used in s. 240 of Act VIII of 1859 as opposed to public or auction sale. Mr. Justice Phear, in the judgment cited by the appellant's counsel (1), says: "In the repealed Regulation, from which s. 240 is taken, private alienation is opposed to alienation by auction sale, and I apprehend that at the date of that Regulation the words 'auction sale' referred to a sale effected under some power of selling paramount to the owner's will. In my opinion, private alienation means alienation voluntarily effected by the owner in exercise of his ordinary powers of ownership (2)." I am quite willing to accept this definition. When parties have a difference and carry it into Court, and agree to submit it to arbitration, and as in this case bind themselves to abide by the decision of the arbitrators, they are following a course of their own free will, and one which the Court in no sense compels them to adopt. When the award has been made by the arbitrators, and the usual conditions have been fulfilled, the Court proceeds to give judgment according to the award, and upon the judgment so given a decree follows, which decree is to be enforced in the manner provided by the Code for the execution of decrees. The award, the basis of the decree, is a settlement of a dispute between A and B, with which C, a third party, has no concern whatever: as between A and B, the award once made, a decree must be enforced by the operation of law if need be. But it does not follow that it is to be enforced as such to the prejudice of C, to whom, in my opinion, it is nothing more than a private sale of her property from A to B. In the case cited to us, the judgment of Mr. Justice Phear did not prevail, and I would say that his argument, which had a special application to the case then before him, would not apply to a case such as that now before us. This is not a case in which the policy of the Insolvent Act has to be considered. Nor one in which the Collector of land-revenue causes property to be sold under the law for arrears due to the Govern-

(1) *Anand Chandra Pal* v. *Panchilal Sarma*, 5 B. L. R., 691.

(2) at pp. 705-706.

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ment, or where some other authority by virtue of power given to it can order a sale. The award of arbitrators, though enforceable by law as between A and B, is the settlement of a dispute between themselves, and as they consent to abide by the settlement, the execution of a deed of sale in accordance with its terms is, I think, a private alienation within the meaning of s. 216 of the Code.

It is certain that it is not a public sale in the sense of an auction-sale. It is not an involuntary sale since it arises out of the voluntary exercise of the will of the parties, who consented to abide the award of a referee. The Court's action is merely mechanical until the award is made, and its decree when given is nothing more than a ordinary decree of Court. Had there been no submission of the case to arbitration, no one can say that the Court would have ordered the sale. Indeed it could not have done so, but must have decided the case on the merits. When the property was attached by execution of decree (the 10th June, 1878), I cannot hold that it had become vested in plaintiff by the award of arbitrators dated the 4th June, 1878. The award had not been confirmed, and was not, when it was prepared, binding upon the parties to it. It was not binding upon them until the procedure of s. 522 of the Code had been completed by a decree in accordance with the award. Moreover, the award does not pass the property by sale. It directs that, within fifteen days from the confirmation of the award, the one party shall execute a deed of sale of the property in favour of the other, and that until this has been done the property shall remain hypothecated. When the attachment was made on the 10th June, the sale-deed had not been executed, and the award itself had not been confirmed. The sale-deed was not executed until 28th June, 1878, when the property was already under attachment, which attachment continued until the auction-sale of the 20th July, 1878. Under s. 276 any private sale is void as against the execution creditor, and therefore the auction-sale of the 20th July, 1878, appears to have given a good title to the purchaser, and the plaintiff cannot succeed in setting aside that sale, on the ground either that the property was sold to him on the 28th June, 1878, or that the sale was not a private alienation, but one that was involuntary under the operation of law. I would dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—On the 21st May, 1878, one Biba Jan obtained a money-decree against Lachman Das, defendant-respondent No. 2. On the 3rd June following she applied for execution, and on the 10th of the same month the property to which the present suit has reference was attached. On the 20th July it was brought to auction-sale, at which defendant-respondent No. 1 became the purchaser. This sale was subsequently confirmed.

The respondent No. 2 formerly carried on business in a large way as a banker at Bareilly, and prior to the commencement of 1878 the plaintiff-appellant had been a depositor with him to a large amount. In February of that year, in consequence of certain rumours coming to his ears, the appellant called upon respondent No. 2 to pay over the moneys in his hand. This respondent No. 2 confessed his inability to do, and ultimately on the 24th February he executed a conveyance to the appellant of certain properties belonging to him, among them the mauza involved in this suit. In this conveyance the properties were represented to be free from charge or incumbrance, but very shortly after the execution of the instrument the appellant had reason to doubt the accuracy of this statement, and he at once, upon the 1st March, instituted a suit against respondent No. 2, first, to have the conveyance set aside, and, secondly, to recover Rs. 32,571-2-0, the amount then due and owing to him. On the 14th May, by order of the Subordinate Judge, upon an agreement between the parties, the suit was referred to arbitration under s. 508 of the Civil Procedure Code, and on the 4th June the award was made. Objections were filed by respondent No. 2, but they do not seem to have been pressed, and on the 20th June a decree was passed upon the basis of the award under s. 522 of the Code in the following terms:—"It is ordered that, in accordance with the arbitration award, a decree for Rs. 35,095-2-0 be passed in favour of the plaintiff against the defendant: that the defendant do execute, within fifteen days, a sale-deed in lieu of Rs. 9,200 in respect of 872 biswas of mauza Mora, of a decree of the 27th February, 1875, for Rs. 1,700 against Major Denehy, and of the bond executed by Parshadi Lal, dated 24th February, 1878: that until completion thereof the property be considered to stand hypothecated: that should Major Denehy plead pay-

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ment, the defendant will remain liable to that extent." On the 28th June, 1878, the sale-deed directed by this decree to be made was executed, and duly registered on the 2nd July. Under it the appellant obtained possession of mauza Mora, but was subsequently ousted therefrom by respondent No. 1, and on the 15th July, 1879, the present suit was instituted. It will therefore be seen that the contest lies between the appellant, purchaser under a sale-deed of the 28th June, 1878, made by his judgment-debtor, in execution of the decree of 20th June, 1878, which was based upon the award of the 4th of June, and respondent No. 1, auction-purchaser at a sale in execution of the 20th July, 1878, of a money decree, under which attachment had been made upon the 10th of June. Both the lower Courts dismissed the suit, and the substantial ground in appeal before us is, that the lower appellate Court has misapplied and misinterpreted the provisions of s 276 of the Civil Procedure Code. It is further contended, that the terms of the award created and gave the appellant a lien upon the property from the moment it was made, on the 4th June, and that the subsequent attachment on the 10th June was ineffectual. In the view I take of this case, it does not appear to me necessary to consider the second point. Whatever may have been the effect of the provisions of Act VIII of 1859, I do not think that under the present Code an attachment after judgment has the effect of creating a lien for the holder of the decree for money on the strength of which the property has been attached. Nor does it give him any priority in the distribution of assets subsequently realized by sale in execution of decree against other judgment-creditors. All holders of decrees for money are now apparently upon the same footing, and are entitled to a rateable division of the sale-proceeds, no matter when their attachments were made, if they have applied for execution of their decrees. As far as I can see, the present effect of attachment is to make any "private alienation" subsequent thereto *de facto* void; and if the property attached happens to be sold in execution of some other decree, it enables the attaching creditor, under s. 295 of the Code, to participate in the assets derived from such sale. The real question in the present case therefore appears to be, whether the sale-deed of the 28th June, 1878, by respondent No. 2 to the appellant can be

regarded as a private alienation. I do not think that it can. The agreement to refer a suit to arbitration does not close the litigation: on the contrary, the parties continue before the arbitrators in the adverse positions of plaintiff and defendant, the one seeking to fix liability on the other, and the other to avoid that liability. Even if the award is subsequently made upon the consent of the parties, it does not occur to me that it stands in any respects in a different position to a confession of judgment in the suit itself, and the decree that is passed in either case would seemingly stand upon the same footing. When once the award has been made, the arbitrators have no power to alter it, and it can only be set aside or amended by the Court itself that passed the original order of reference, upon certain defined grounds specified in the Code. After the limited time for filing objections, it is imperative upon the Court to give its judgment in accordance with the award, and upon such judgment a decree follows which can be enforced in manner provided for the execution of ordinary decrees. This procedure was followed in the present case, and the decree of the 20th June, 1878, being in accordance with the judgment and the award, became final. It is not suggested that in framing the decree as it did the Court exceeded its powers, but even if it did, it is difficult to see how the decree, having become final by positive declaration of law, and no steps having been taken to set it aside, can be questioned or disturbed. It is true that, if the suit had proceeded in ordinary course instead of being referred to arbitration, all that the Court could have done would have been to pass a simple money-decree in favour of the plaintiff. But it does not appear to me that this is a conclusive argument to show that a decree given in accordance with the special provisions of s. 522 of the Code is to be regarded as a private arrangement, and as ineffectual against third parties. I think the words "private alienation" mean a voluntary sale, gift, or mortgage in contravention of the attachment order, and not as in the present case the enforced execution of a conveyance or assignment in obedience to the decree of a Court qualified to pass it. Had the judgment-debtor refused to execute the sale-deed of the 28th June, 1878, he might have been compelled to do so, or the Court itself might have done it for him. Such being the view I entertain, which I regret is at variance

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with that held by my brother Spankie, I am of opinion that the respondent No. 1 purchased nothing at the sale of the 20th July, 1878, and that he has wrongly obtained possession of property the ownership of which had passed before that date to the appellant.

I would therefore allow this appeal with costs, and reversing the decision of both the lower Courts, decree the appellant's claim.

The plaintiff appealed to the Full Court, under s. 10 of the Letters Patent, from the judgment of Spankie, J.

Mr. *Ross*, for the appellant.

Maulvi *Obeidul Rahman*, for the respondents.

The following judgment was delivered by the Full Bench :—

TYRRELL, J. (STUART, C. J., STRAIGHT, J., OLDFIELD, J., and BRODHURST, J., concurring)—Having heard argument on both sides, we have no doubt that this appeal must be allowed. The sale of the 28th June, 1878, made under the operation of an arbitration decretal order and conveying to the appellant property which had been previously attached in execution of the decree of another case, was not a private alienation in the sense of s. 276 of the Civil Procedure Code. That sale was therefore unaffected by the special disabilities created by that section. No authority was cited, and we are not aware that any exists in support of the contrary view adopted in the judgment (*per* Spankie, J.) which is the subject of this appeal: but the interpretation that we approve is in harmony with the principle applied by a Bench of this Court in the analogous case of *Sarkies* v. *Bundho Baee* (1).

We reverse the judgment of Spankie, J., and affirming that of Straight, J., we set aside the decrees of the Courts below, and decree this appeal with all the costs of the litigation.

Appeal allowed.

(1) N.-W. P. H. C Rep., 1869, p. 81 (21st June 1869.)

Before Sir Robert Stuart, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

1882 January 23.

SRI RAM (DEFENDANT) *v.* BHAGIRATH LAL (PLAINTIFF).

Registered and unregistered documents—Act III of 1877 (*Registration Act*), *s.* 50.

Held (STUART, C. J., doubting) that under the provisions of s 50 of the Registration Act, 1877, documents registered under former Registration Acts do not take precedence over all unregistered documents, of which at the time of their execution registration was either optional or not required.

Lachman Das v. *Dip Chand* (1) observed on.

THIS was a reference to the Full Bench by Straight, J., and Oldfield, J., of the following question:—

"Under the provisions of s. 50 of the Registration Act, 1877, do documents registered under former Registration Acts now take precedence over all unregistered documents, of which at the time of their execution registration was either optional or not required?"

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—I have anxiously conferred with my colleagues on this case, and I have attentively considered the opinions they have expressed, and I have been desirous of adopting their view of s. 50 of the Registration Act of 1877 if I could, as I consider it more equitable and just than a construction that would give priority to documents registered under previous laws over all unregistered documents past or present.

I fully appreciate and respect such a reading of the Act of 1877, but I entertain some difficulty in holding that such is the real intent and meaning of s. 50 of the Act of 1877. That section expressly provides that "every document of the kinds mentioned in clauses (*a*) and (*b*) of s. 18 shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." And to this section there is appended

*Second Appeal, No. 604 of 1881, from a decree of R. M King, Esq, Judge of Saháranpur, dated the 1st March, 1881, reversing a decree of Babu Ishri Prasad, Munsif of Deoband, dated the 22nd December, 1880.

(1) I. L. R. 2 All. 851.

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the following "Explanation":—"In cases where Act XVI of 1864 or Act XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under Act VIII of 1871 or this Act". Now by these provisions the words "duly registered" may of themselves I think be fairly argued to mean registered according to the law in operation at the time of such registration, and I observe that such is the meaning given of the word "registered" in the interpretation clause (s. 3) of the present Limitation Act, XV of 1877. As for the words "unregistered document" in s. 50, they may, as it appears to me, be taken to be synonymous with a document *not* "duly registered," and therefore the term "unregistered" in the Explanation means not duly registered according to the Acts therein mentioned, *viz.*, Act XVI of 1864, Act XX of 1866, and Act VIII of 1871, in fact that the term "unregistered" is simply the correlative in the negative of the expression "duly registered" in the section, and that this meaning applies to the whole ground covered by s. 50, and the "Explanation" must be understood to include documents as well registered as unregistered. At the same time the opinion that the expression "duly registered" in the section only applies to documents registered under the Act of 1877 itself, is, I allow, a reasonable and beneficial view of its meaning, and I wish I could believe that such was its true intention, but for the reason I have indicated I seriously doubt whether such an intention was meant.

With respect to the Full Bench judgment in *Lachman Das* v. *Dip Chand* (1) the report of that case does not show that such a question was there raised, it having been a mere accident, as I consider, that the registered document to which priority was given by the judgment had been registered under the Act of 1877, the other two documents which were postponed to it not having been registered at all. I observe it is stated in the report of the Full Bench case that there had been conflicting rulings of the Calcutta Court and this Court, but the only Calcutta case thus referred to is

(1) I. L. R. 2 All. 851.

that of *Oghra Singh* v. *Ablakki Kooer* (1). That was a case, however, which was held to fall under s. 50 of the Registration Act of 1871, and it therefore has no application to the present question, and it is noticeable that Mr. Justice Mitter, who delivered the judgment in that case, is at pains to show, by reference to dates, that s. 50 of the present Registration Act could not govern it. There does not indeed appear to be any substantial conflict between the rulings of the two Courts.

No doubt it is a canon in the construction of Acts of the Legislature, and indeed of all written laws, that they are not to have any retrospective operation. But that is a mere presumption which yields to the plain demonstration of language to the contrary, and it may I think be argued with great reason that in s. 50, read with the Explanation to it, we have such a demonstration, and it is therefore the expressed intention of the Legislature that s. 50 should have retrospective effect on everything that may have been done or not done in the way of registration or non-registration under the Registration Acts mentioned in the Explanation.

Again, I fully admit the force of the consideration referred to at the hearing, respecting the hardship and inconvenience of a different view of the present law, because it might have the effect of prejudicing rights and titles originally acquired by law and of otherwise interfering with contracts. But, on reflection, it appears to me that in principle the very same hardship and injustice, in a different degree it may be, greater or less, would result under any other application of the priority or preference given by s. 50 to all registered, in the largest sense, over all unregistered, documents. It would be a mere question of degree and not of principle, it being a greater hardship in some cases than in others. Thus the Full Bench ruling referred to at the hearing, and which I understand was fully accepted by my colleagues, legalized the preference of a deed of sale dated in July, 1878, in favour of one Dip Chand over two mortgages or hypothecating bonds of the same property dated respectively in 1875 and 1876, and neither of which had been registered at all. Here was a manifest wrong done to two mortgagees who were holding mortgages or contracts,

(1) I. L. R. 4 Calc. 536.

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the registration of which were optional and not compulsory at the time they were made, by the retrospective operation of the Act of 1877. That morally was a gross injustice to these mortgagees, but the policy of s. 50 of the Act of 1877 by which it was intended to favour registration, registration as I consider under all circumstances past or present, was evidently considered by the Legislature a matter of greater importance and of greater benefit to the community at large than any individual or particular case of inconvenience, or it might be injustice, which might be the consequence of such a reform of the registration law.

Such are my doubts and difficulties, and they have taken such hold of my mind that, to say the least, I hesitate to give my full assent to the opinions my colleagues have recorded.

My answer therefore to the present reference must rather be in the affirmative of the question put to us than in the negative, although at the same time I should gladly accept the law as expounded by my colleagues, and I only hope that it was so intended by the Legislature. I need scarcely add that the whole difficulty we have experienced in this case would have been avoided by the simple addition of the words "under this Act" to the words "if duly registered," if that was really meant and intended.

STRAIGHT, J. (OLDFIELD, J., BRODHURST, J., and TYRRELL, J., concurring)—This reference has undoubtedly been rendered necessary in consequence of the misunderstanding that has arisen as to the meaning of the Full Bench judgment of this Court in *Lachman Das* v. *Dip Chand* (1) That case decided no more than this, namely, that a document registered *under Act III of* 1877, registration of which was compulsory, has priority over a document executed while Act VIII of 1871 was in force, and the registration of which was optional. The question put to us by this reference, however, has a much wider range, and goes to the *status* of all documents executed before Act III of 1877 came into force, whether their registration was optional or compulsory. It is contended, that the words "if duly registered" in s. 50 of the above last mentioned Act must be read to mean registered under

(1) I. L. R., 2 All. 851.

any Act, and that the intention of the Legislature was, from and after a particular date, to give all registered documents of the kinds mentioned in clauses (*a*), (*b*), (*c*) and (*d*), and (*a*) and (*b*), of ss. 17 and 18 of the Act of 1877, no matter when executed, precedence over all unregistered documents, even though the registration of these latter was optional at the time of their execution. We cannot adopt this view. What we are in point of fact asked to do is, to give a retrospective operation to s. 50 of Act III of 1877, which would have the effect of destroying rights and titles theretofore legally and properly acquired, and of disturbing the relative value and force of contracts, hitherto equally efficacious and binding, by arbitrarily attaching a disability to some of them, under which they did not labour at the time of execution. We think that what the provisions of s. 50 aimed at, was from and after the coming into operation of Act III of 1877 to alter the state of things theretofore existing under ss. 50 and 18 of Act VIII of 1871, and to give all documents compulsorily registrable under clauses (*a*), (*b*), (*c*), and (*d*) of s. 17, and optionally registrable under clauses (*a*) and (*b*) of s. 18 of such first mentioned Act, *if registered*, priority over all documents optionally registrable but *not registered*. In other words, it was intended to hold out an inducement to parties interested in optionally registrable documents to register them.

In our opinion, as between documents executed before Act III of 1877 came into operation, their relative positions to one another remain upon the footing provided for them by the Registration Law in force when they were executed. Of course since April, 1877, every unregistered document of the kinds mentioned in clauses (*a*), (*b*), (*c*), and (*d*), and (*a*) and (*b*), of ss. 17 and 18 of Act III of 1877, is subordinate to a document registered under that Act. We may add that we think the so to speak retrospective effect given to the word "unregistered" in the Explanation to s. 50, and the omission of all reference to the word "registered" in the body of the section, is an indication that this latter expression was intended to the limited to the Act itself.

With these remarks, our reply to the question put by this reference must be in the negative.

1882
January 23.

CIVIL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Oldfield.

MARTIN (PLAINTIFF) *v.* SHEO RAM LAL (DEFENDANT).*

Registration—Unregistered indigo "sattah"—Admissibility in evidence of claim for damages—Act III of 1877 (*Registration Act*), *s.* 49.

S gave *M* a lease of certain land, which required by law to be registered, but which was not registered, in which it was stipulated that, if he failed to deliver any portion of such land, he should pay damages at a certain rate per bigha in respect of the portion not delivered, and in which such land was hypothecated as security for the payment of such damages. *S* having failed to deliver a portion of such land, *M* sued him for damages in respect of such portion according to the terms of the lease, not seeking to enforce the hypothecation, as the lease was not registered, but seeking only a money-decree. *Held* that the lease, being unregistered, could not be received as evidence even of *S's* personal liability thereunder. *Sheo Dial* v. *Prag Dat Misr* (1) distinguished.

THIS was an application to the High Court by the plaintiff in a suit for the exercise of its powers of revision under s. 622 of Act X of 1877. The facts of the case are sufficiently stated for the purposes of this report in the order of the High Court.

Mr. *Conlan* and Shah *Asad Ali*, for the plaintiff.

The *Senior Government Pleader* (Lala *Jwala Prasad*) and Pandit *Ajudhia Nath*, for the defendant.

The order of the Court (STRAIGHT, J., and OLDFIELD, J.) was delivered by

STRAIGHT, J.—This is an application under s. 622 of the Civil Procedure Code for revision of a decision of the Subordinate Judge of Azamgarh, passed upon the 22nd September 1880. The petition was not filed until the 11th July, 1881, nearly ten months after the judgment complained of had been given, and we cannot avoid remarking not only that such delay is most unpardonable, but that it is high time some period of limitation were provided by the Legislature within which these applications for revision must be made.

The circumstances of the case appears to be as follows. On the 13th March, 1875, the defendant Sheo Ram Lal, zamindar of mauza

*Application, No. 98 of 1881, for revision under s. 622 of Act X of 1877 of a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 22nd September, 1880, reversing a decree of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 24th June 1880.

(1) I. L. R. 3 All. 229.

Basaipur, in the Azamgarh district, executed an instrument in favour of Mrs. Elizabeth Martin, the plaintiff, in which, after reciting that upon a balancing of accounts Rs. 61 was found to be due from the defendant to the plaintiff, the former in consideration of the above amount "gave to Mrs. Martin aforesaid 13 bighas 10 biswas of land at the rent of Rs. 4 or Rs. 5 per bigha, as preferred or chosen by the godown agents, for a period from 1282 to 1284 fasli, namely, for a term within three years, at the time of sowing indigo *i.e.*, I (the executant) will give the land to the aforesaid karindas for sowing indigo from 15th Chait till the 15th Jaith: that should I, or any under-tenant or non-hereditary tenant, or anybody else, cause interference and offer obstruction in the sowing of the indigo, I shall pay damages to the lady at the rate of Rs. 40 per bigha: that should I fail to give all the field as provided in the lease to the godown servants, and any part of such land remains with me, I shall pay damages at the rate of Rs. 40 per bigha: that if anything remains unpaid to the lady of the principal *zar-i-peshgi* money, she will be competent to realize the same from me or my property, together with the damages in respect of the land, in any way she thinks proper, and that till the payment my share in mauza Basaipur, and also other property, moveable and immoveable, shall remain pledged and hypothecated for the dues under the lease." The defendant, so the plaintiff alleges, did not give her the 13 bighas 10 biswas contracted for, but only 4 bighas 9 biswas 1 dhur, and the suit now under consideration was brought to recover Rs. 361-14-6 as damages, at the rate of Rs. 40 per bigha on the 9 bighas 9 dhurs not surrendered, and Rs. 38-12-9 balance of the Rs. 61-1-0 unpaid. It will be observed that though the instrument of the 13th March, 1875, contains an hypothecation of property for the damages, the plaintiff did not ask to enforce that part of the contract but only sought a money-decree. The Munsif decreed the plaintiff's claim, but on appeal the Subordinate Judge reversed his decision, holding that the document of the 13th March, 1875, being a lease for more than one year, and containing an hypothecation of immoveable property, was, under s. 17 of Act III of 1877, compulsorily registerable, and not having been registered was inadmissible in evidence. It is obvious that in speaking of Act III of 1877 the Subordinate Judge fell into error, as the law in force

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at the time of execution of the document was Act VIII of 1871. This, however, makes no material difference, as the provisions of both Acts upon this point are identical. As against the Subordinate Judge's decision it was urged before us by Mr. Conlan for the plaintiff that, the suit being merely one for damages, the document of the 13th March, 1875, was admissible to show the personal liability of the defendant, under the authority of the Full Bench ruling of the Court in *Sheo Dial* v. *Pray Dat Misr* (1). It was, moreover, contended that the document, if a lease at all, was not from year to year, but for one year, and as such not compulsorily but optionally registrable.

The first question to be determined is as to the nature of the document, and upon examining its language we can come to no other conclusion than that it is a lease of 13 bighas 10 biswas and for a term "exceeding one year" at least, if not for three years. Such in our opinion being the character of the instrument, it was compulsorily registrable under s. 17 of Act VIII of 1871, the law in force at the time of its execution, and not having been so registered, was primarily inadmissible in evidence in the present suit, under the provisions of s. 49 of Act III of 1877. The next point to be considered is, whether the document, though a lease for more than one year and though unregistered, can be received to the extent that it shows a personal liability in the defendant to damages. It appears to us that the present case is wholly different and distinguishable from the Full Bench decision already referred to. There a loan had been made, and what we held was that to establish the debt the unregistered bond might be given in evidence. But no such state of things exists here. The present suit is essentially one for damages for breach of a contract of lease to surrender certain lands to the plaintiff for cultivation, and the measure of damages has to be estimated according to the amount of land that the defendant has failed to deliver over. Before the question can be opened up the contract itself must be established, and as this is in the nature of a lease and records a transaction affecting immoveable property for a term exceeding one year, its non-registration is fatal to its production. In short it is impossible to separate the leasing of the

(1) I. L. R. 2 All. 229.

land from the defendant's personal liability for damages, or to hold that the contract is other than one and indivisible. Such being our view, it is unnecessary to consider the points urged on behalf of the defendant. We hold that the decision of the Subordinate Judge was right, and that this application must be dismissed with costs.

Application rejected.

APPELLATE CIVIL.

1882 *January* 26

Before Mr. Justice Straight and Mr. Justice Brodhurst

PADARATH SINGH (DEFENDANT) *v.* RAJA RAM AND AFTER HIS DEATH AKAUTI KUAR (PLAINTIFF.)

Joint Hindu family—Suit by son to set aside Father's alienation of ancestral property—Death of son—Abatement of suit—Hindu mother.

Where a Hindu minor, governed by the law of the Mitakshara, on whose behalf a suit to set aside his father's alienation of ancestral property had been instituted, died, *held* that no right to sue survived in favour of his mother, but the suit abated.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Kashi Prasad* and Babu *Lal Chand*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J., and BRODHURST, J.) was delivered by

STRAIGHT, J., (BRODHURST, J., concurring).—The two suits involved in these Second Appeals 51 and 52 of 1881 were instituted on behalf of the minor plaintiff, Raja Ram, by his guardian and mother Akauti Kuar, against Mathura Singh his father, Sheo Saran Singh and Dukhi Singh mortgagees, and Padarath Singh auction purchaser, to recover a half share of certain ancestral properties, which it was alleged had been improperly incumbered by the said Mathura Singh, and subsequently sold in execution of decrees obtained on the mortgages executed by him. The Munsif dismissed

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* Second Appeal, No. 51 of 1881, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 25th November, 1880, reversing a decree of Maulvi Mazhar Husain, Munsif of Muhammadabad, dated the 23th June, 1880.

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the minor plaintiff's claim in both suits, but on appeal the Subordinate Judge reversed his decision, and decreed the relief prayed.

The auction-purchaser, defendant, now appeals to this Court. It appears that since the appeal was filed the minor Raja Ram has died, and that upon the application of the appellant Akauti Kuar, hitherto his guardian for the suit, has been substituted as his legal representative.

When the case came on before us for hearing a preliminary objection was taken by Munshi Kashi Prasad, the pleader for the appellant, that any right the minor Raja Ram might have had to maintain the present suit lapsed with his death, that he never acquired any individual separate interest in the joint family property, which would be inherited under the Mitakshara by his mother, and that therefore no cause of action survived his decease. This contention came with strange inconsistency from the appellant, who himself caused Akauti Kuar to be brought upon the record as the heir and legal representative of the deceased minor. I am, however, not prepared to hold that, by so doing, he has estopped himself from denying her *status* to continue the suit. The substantial point for determination is, whether on the death of the minor Raja Ram any right to sue survived to Akauti Kuar as his heiress? I am clearly of opinion that it did not. Raja Ram and his father Mathura remained joint until the death of the former, and there was no partition or division of shares among them; on the contrary they preserved all the characteristics of a joint family. Under the Mitakshara Akauti Kuar would, in the event of her son having acquired separate estate, have succeeded to it as his heir in preference to his father. But this is beside the question now before us. Raja Ram never had any higher or better interest than that which exists in every member of a joint and undivided Hindu family, and the mere circumstance that he asserted his right to a certain portion of the ancestral estate, and had brought the present suit to set aside an alienation thereof effected by his father, did not create any separate title in him. It appears to me, therefore, that whatever right to sue existed was personal to the minor Raja Ram, that Akauti Kuar is not his heir, and therefore cannot continue the suit, which should be dismissed. The appeal must be accordingly

decreed with costs in the two lower Courts. As the appellant chose to bring Akauti Kuar on the record in the character he did, he will pay her costs in this Court.

Appeal allowed.

Before Mr. Justice Straight and Mr Justice Oldfield.

KISHNA RAM (PLAINTIFF) *v.* HINGU LAL AND OTHERS (DEFENDANTS) *

Landholder and tenant—Suit for arrears of rent—Right to rent disputed by third person—Appeal by intervenor—Act XVIII of 1873 *(N.-W. P. Rent Act), ss.* 148, 183, 189.

K sued *B* for arrears of rent, such arrears not exceeding Rs. 100. His right to receive rent was disputed by *H*, a third person, who was made a defendant under the provisions of s. 148 of Act XVIII of 1873. The suit was tried by an Assistant Collector of the second class, who decided that *K* was entitled to the rent. *H* and *B* appealed to the Collector, who decided that *H* was entitled to the rent. *K* thereupon appealed to the District Judge, who affirmed the decision of the Collector. *K* then appealed to the High Court.

Held that the Collector was not competent to entertain an appeal by *H*, that, as between *K* and *B*, all that the Collector could decide was whether or not *K* was entitled to the amount of rent claimed, that the District Judge had no jurisdiction to entertain *K's* appeal, and that *K's* appeal to the High Court was not entertainable, the District Judge not having decided any question of proprietary right that would justify such an appeal.

KISHNA RAM sued Bhagwant Lal in the Court of an Assistant Collector of the second class for Rs. 9-7-3, arrears of rent on account of certain land. Hingu Lal and certain other persons intervened, disputing the plaintiff's right to the rent of such land, and claiming to be themselves entitled to the rent thereof. They were accordingly made defendants to the suit under s. 148 of Act XVIII of 1873. The Assistant Collector decided that the plaintiff was entitled to the rent of such land, and the intervenors were not entitled to it; and gave the plaintiff a decree for Rs 6-0-3. The intervenors and Bhagwant Lal, the tenant of such land, appealed to the Collector of the District. That officer decided that the intervenors were entitled to receive the rent of such land; and reversed the decree of the Assistant Collector. The plaintiff thereupon appealed to the District Judge, who affirmed the decree of the Collector of the District.

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* Second Appeal, No. 411 of 1881, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 15th January, 1881, affirming a decree of T. R. Wyer Esq., Officiating Collector of Azamgarh, dated the 28th September, 1880, reversing a decree of Munshi Sital Prasad, Assistant Collector of the second class, Amaoha, dated the 1st June, 1880.

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On appeal to the High Court the plaintiff contended that an appeal by the intervenors to the Collecter did not lie, and consequently the Collector had exercised a jurisdiction not vested in him in entertaining their appeal and setting aside the Assistant Collector's decree, and his decree should be set aside.

Munshi *Sukh Ram*, for the appellant

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.,) was delivered by

STRAIGHT, J.—We are of opinion that no appeal lay by the intervenor from the decision of the Deputy Collector to the Collector, and, in so far as the Collector entertained the objections of the intervenor, he acted beyond his powers. But as between the zamindar plaintiff and the defendant tenant, the decision of the Assistant Collector of the second class was appealable to the Collector under s. 183 of the Rent Act, 1873. There was no question then before the Collector in which the proprietary title to land between parties making conflicting claims thereto had to be determined, for, as we have already remarked, the intervenor could not properly be a party to the proceeding in his Court. All the Collector could decide was as to whether the plaintiff zamindar was or was not entitled to so much rent, and, to the extent that his judgment travels beyond this, it is without force or effect. Holding this view, we think the Judge had no jurisdiction to entertain the appeal, nor has he decided any question of proprietary right that would justify an appeal to this Court. The appeal is accordingly dismissed with costs as unentertainable.

Appeal dismissed.

1882
January 30.

Before Mr. Justice Straight and Mr. Justice Oldfield.

RAMADHIN MAHTON AND OTHERS (DEFENDANTS) *v.* GANESH AND ANOTHER (PLAINTIFFS).*

Appeal to Her Majesty in Council—"Final decree"—Act X of 1877 (*Civil Procedure Code*), *s.* 595 (*a*).

Certain persons interested in an award applied under s. 525 of the Civil Procedure Code to have it filed in Court. The Court made an order under s. 526 "that

* Application, No. 11 of 1881, for leave to appeal to Her Majesty in Council.

the claim of the plaintiffs be decreed." The defendants appealed to the High Court from this "decree." The High Court held that the appeal would not lie; and suggested to the plaintiffs to apply to the lower Court to give judgment according to the award, and a decree to follow it. Thereupon the plaintiffs made an application to the lower Court of the nature suggested, but styled it one for review of judgment The lower Court granted the so-called review of judgment. The defendants appealed from the order of the lower Court, contending that the "review of judgment" had been improperly granted On the 23rd June 1880 the High Court held that the order of the lower Court was not appealable, not being one passed on review of judgment, but on an application to give judgment and decree in accordance with an award which had been filed in Court. The defendants applied for leave to appeal to Her Majesty in Council from the order of the High Court of the 23rd June 1880. *Held* that such order was not a "final decree" within the meaning of s. 595 (*a*) of the Civil Procedure Code, and therefore it was not appealable to Her Majesty in Council.

IN 1878 two persons named Ganesh and Mahesh applied, under s. 525 of the Code of Civil Procedure, to the Subordinate Judge of Gorakhpur to have a certain award made on a private reference to arbitration filed in Court. Notice to show cause was served on the other side, and objections were made to the award being filed, on the ground that the arbitrator had determined matters not referred to arbitration; that the award was vague and incapable of execution; and that the arbitrator had been guilty of misconduct and corruption. The Subordinate Judge, after considering these objections, held that the award was valid; and on the 5th April, 1877, ordered "that the claim of the plaintiffs be decreed." Two of the defendants appealed to the High Court from the Subordinate Judge's "decree." The High Court (1), on the 17th November, 1879, held that no appeal lay from the Subordinate Judge's order, one of the Judges adding this instruction: "The Court below should be moved to give judgment in accordance with the award and a decree to follow it." On the 27th April, 1880, the plaintiffs made an application to the Subordinate Judge of Gorakhpur of the nature suggested by the High Court, but styled it one for review of judgment. On the 28th September, 1880, the Subordinate Judge granted the "review" prayed for. The defendants appealed to the High Court from the Subordinate Judge's order, contending that a review should not have been granted so long after the date of the original order. On the 23rd June, 1880, the

(1) See *Ramadhin* v. *Mahesh*, I. L. R., 2 All. 471.

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High Court (Straight, J., and Duthoit, J.,) dismissed the appeal, under the following order:—

"We are of opinion that the 1880 proceedings in the Court of the Subordinate Judge were erroneously called proceedings in review of judgment; and as substantial justice appears to have been done in them, we think it unnecessary to make any order in this respect."

The defendants subsequently applied to the High Court for leave to appeal to Her Majesty in Council from its order of the 23rd June, 1880.

Munshi *Hanuman Prasad* and Maulvi *Mehdi Hasan*, for the defendants.

Mr. *Niblett* and Munshi *Kashi Prasad*, for the plaintiffs.

The Court (STRAIGHT, J., and OLDFIELD, J.,) made the following order:—

STRAIGHT, J.—The order of this Court passed upon the 23rd June last virtually dismissed the appeal on the ground that no appeal lay from the order of the Subordinate Judge, which erroneously styled an application to have judgment and decree passed upon the basis of the award that had been filed as being one for review. In our opinion no final decree has as yet been passed on the arbitration proceedings by this Court, which would authorise an appeal to Her Majesty in Council, and we accordingly reject the application with costs.

Application rejected.

1882 *January* 30.

Before Mr. Justice Straight and Mr. Justice Oldfield.

GANGA (JUDGMENT-DEBTOR) *v.* MURLI DHAR (DECREE-HOLDER)*

Execution of decree—Compromise—Contract superseding decree.

A judgment-debtor, against whom a decree for money was in course of execution, presented a petition to the Court executing the decree in which it was stated that a part of the money payable under the decree had been paid; that it had been agreed that a part of the balance should be set off against a debt due to the judgment-debtor to be realized by the decree holder, and the remainder should be paid by the judgment-debtor by certain instalments; and that, if default were made in payment of any one instalment, the decree-holder should be at liberty to execute the decree for the whole amount, and the judgment-debtor asked the Court

* Second Appeal, No. 67 of 1881, from an order of S. M. Moens, Esq., Judge of Aligarh, dated the 23rd June, 1881, reversing an order of Maulvi Mubarik ul lah, Munsif of Jalesar, dated the 3rd May, 1881.

to sanction the arrangement. The decree-holder expressed his assent to the arrangement, and the Court recorded a proceeding reciting the arrangement, and releasing from attachment property of the judgment-debtor which had been attached. Default having been made, the decree-holder applied for execution of the decree. *Held* that the petition of the judgment-debtor set out above did not amount to nor was it any evidence of a new contract superseding the decree, and the decree might be executed. *Debi Rai* v. *Gokul Prasad* (1) distinguished.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondent.

The Court (STRAIGHT, J., and OLDFIELD, J.,) delivered the following judgments:—

OLDFIELD, J.—Murli Dhar obtained a decree against Ganga, appellant, on the 9th March, 1875, for Rs. 900 with interest to date of payment at Rs. 8 per cent. He took out execution on the 26th May, 1876, and in course of the proceedings the judgment-debtor filed an application to the effect that Rs. 617-2-0 had been paid, and there remained due a sum of Rs. 498-10-6, which it had been agreed should be satisfied by the decree-holder realizing from one Moti Ram Rs. 315, the price of corn, for the sale of which the judgment-debtor had obtained a decree, and by the judgment debtor paying the balance to the decree-holder by half-yearly instalments of Rs. 50 each, and that in case of any default in paying an instalment, the decree-holder should be at liberty to realize the entire sum due at once with interest, and the judgment-debtor asked for the sanction of the Court to the arrangement, and stated that certain property named was pledged for the amount. The decree-holder by his pleader signified his assent to the arrangement, and the Court executing the decree drew up a proceeding on the same day reciting the arrangement, and ordered that the property under attachment should be released. Failure to pay instalments having taken place, the decree-holder applied for execution of his decree, and the question before us is, whether this arrangement is to be considered in the light of a new contract which has superseded the

(1) I. L. R. 3 All. 585.

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decree and the latter has in consequence become incapable of execution.

I concur with the Judge in holding that there is no such supersession of the decree, and that it may be executed. We have to see what the *bonâ fide* intention of the parties was, and where the arrangement contains nothing materially at variance with the decree, but is consistent with it, and is made obviously with the object of securing and facilitating its execution, we cannot assume that the parties have entered into a new contract in supersession of the decree. In this case it was the judgment-debtor who moved the Court by asking its sanction to terms for satisfaction of the decree which the decree-holder had accepted, and the Court appears to have given its sanction. The terms offered and accepted were in the interests of the judgment-debtor, and amount to nothing more than allowing him time to satisfy the decree; and the hypothecation of property was made with a view to secure the decree-holder from any loss which the discontinuance of his execution by removing the attachment made under it might entail. Had there been an intention to substitute a new contract, it is reasonable to suppose pains would have been taken to execute a properly stamped and registered deed. In fact what was done was only what s. 210 of the present Civil Procedure Code allows in express terms; the decree as altered by the arrangement to pay by instalments sanctioned under s. 210 can now be executed; but we are not asked to execute the decree in its new form, but in that in which it was passed, and I can see no objection to such a course.

Our attention was called to the Full Bench ruling of this Court in *Debi Rai* v. *Gokul Prasad* (1). On the facts of that case it was held that the agreement could not be executed as a decree, but the present case is distinguishable. We are not asked to execute the agreement, and in *Debi Rai* v. *Gokul Prasad* (1) the agreement varied the decree in the matter of interest.

S. A. No. 499 of 1880 (2), decided by this Court on the 23rd August, 1880, and *Darbha Venkamma* v. *Rama Subbarayadu* (3), are in support of the view I take. I would dismiss the appeal with costs.

(1) I. L. R. 3 All. 585 (2) Not reported.
(3) I. L. R., 1 Mad. 387.

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STRAIGHT, J.—I concur with my Brother Oldfield that the petition of the 26th May, 1876, does not amount to, nor is it evidence of, any new contract in supersession of the decree of the 9th March, 1875. It is obvious that the decree-holder-respondent never intended to abandon his judgment-rights to execution, for after the arrangement had been made with the debtor-appellant, he applied for execution of *his decree* on the 26th May, 1878, and his present application of the 22nd March, 1881, is in similar terms. It is in this respect that the case in appeal before us is so clearly distinguishable from the Full Bench authority quoted at the hearing. The appeal should be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1882 *January* 31.

DANNO (PLAINTIFF) *v.* DARBO AND ANOTHER (DEFENDANTS)*

Hindu law—Mitakshara, ch. i, *s.* iii, *v.* 11, *and ch.* ii, *s.* xi, *v.* 13—*Daughters, right of succession to father's estate—Meaning of "unprovided" for.*

The estate of a deceased Hindu, governed by the law of the Mitakshara, was in the possession of one of his daughters, who was in poor circumstances. His other daughter, who was well off and possessed of property, claimed to share in such estate, contending, with reference to the law of the Mitakshara, that, as no provision had been made for her by her father, she was "unprovided" for, within the meaning of that law, and therefore entitled to share in such estate. *Held* that such expression must be construed irrespective of the sources of provision or non-provision.

ONE Anta, a Hindu, governed by the law of the Mitakshara, died possessed of certain land. He left a widow, Tulsha, and three daughters, Danno, Birji, and Darbo. Tulsha succeeded to such land on her husband's death. On her death, which occurred in October, 1879, Darbo, who resided with her, had her name recorded in respect of such land in the revenue registers. Subsequently, a person who held a decree against Tulsha caused a portion of such land to be sold in execution thereof, such portion being purchased by one Mannu. In January, 1881, Danno and Birji instituted the present suit against Darbo and Mannu in which they claimed possession of two-thirds of such land as heirs to their deceased

* Second Appeal, No. 735 of 1881, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 5th April, 1881, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 14th February, 1881.

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father. The plaintiff Birji subsequently withdrew from the suit. The defendant Darbo set up as a defence to the suit that her father's estate devolved upon her, under the Hindu law of inheritance, she being in poor circumstances, while her sisters, the plaintiffs, were in affluent circumstances. For the purposes of this report it is not necessary to state the defence of the defendant Mannu. The Court of first instance framed as one of the issues for trial the following issue: "Is the plaintiff Danno in affluent, and Darbo in distressed, circumstances? Does the right under the principles of Hindu law to inherit the estate of the deceased father devolve upon Danno or Darbo, or do both of them possess equal rights?" The Court observed on this issue as follows: "It is proved from the evidence of the witnesses produced by the defendant that Darbo is not possessed of means, and has no landed estate or any lands in cultivation. From the evidence of the plaintiff's own witnesses it is clear that the land held by Danno forms the estate of her husband, although it is alleged by them that it is mortgaged. Birji in her petition states that Darbo is poor and indigent, and that Danno is in affluent circumstances. No evidence has been produced by the plaintiff to show that the defendant is possessed of means. From the documents filed by the defendant and the evidence of her witnesses, it is proved that Darbo, in consequence of her husband being in poor circumstances, lived with her mother. Under these circumstances the right to succeed to the possession of the estate of the deceased Tulsha, wife of Anta, devolves after her death upon the indigent daughter Darbo, and not upon the plaintiff Danno who is possessed of property." In accordance with these observations the Court of first instance dismissed the suit. On appeal by the plaintiff the lower appellate Court concurred in the views of the Court of first instance, observing as follows: "The definition of 'unprovided' or 'unendowed' is given in the Mitakshara, ch. i, s. iii, v. 11, to be 'destitute of wealth.' That term cannot be applicable to the appellant, whose own witnesses admit that she has land. They say that it is in possession of mortgagees, but of this there is no other proof. There is no mortgage-deed produced; and the *khewat* shows that the land is recorded as in her possession without mention of mortgagees or mortgage. On the other hand there is good and sufficient proof that the res-

pondent Darbo is indigent and dependent, and under the provision in question has the better claim."

In second appeal the plaintiff Danno contended that the terms "enriched" and "unprovided," as used in the Mitakshara, meant "enriched" and "unprovided" for by the father, and as no property had been given to her by her father she was entitled to share in the property left by him with the defendant her sister.

Babu *Sital Prasad Chattarji*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The suit was in reality a contest between Danno the plaintiff and Darbo the respondent for possession of the estate left by their father Anta. It has been found as a fact by both the lower Courts that Darbo is in poor circumstances, whereas Danno is well off and possessed of property. The question then arises, is the provision of v. 13 of s. xi, ch. ii of the Mitakshara applicable to the case. We think it is, and that the expression "unprovided for," in contradistinction to the term "enriched," must be construed in the sense of "indigent," as opposed to "possessed of means," irrespective of the sources of provision or non-provision. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1882
February 3.

MAHESH SINGH AND OTHERS (PLAINTIFFS) *v.* CHAUHARJA SINGH (DEFENDANT).*

Mortgage—Usufructuary mortgage—Failure of claim to enforce lien—Compensation for breach of contract to give mortgagee possession.

A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage-money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage-money. *Held* that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation;

*Second Appeal, No. 772 of 1881, from a decree of M. S. Howell, Judge of Jaunpur, dated the 1st April, 1881, reversing a decree of Pandit Soti Behari Lal, Munsif of Jaunpur, dated the 6th July, 1880.

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that, although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that in estimating the compensation which should be awarded, the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide.

CHAUHARJA SINGH, one of the defendants in this suit, on the 11th May, 1874, gave the plaintiffs a usufructuary mortgage on certain land for Rs. 400. By the instrument of mortgage it was agreed that possession of the mortgaged property should be given to the plaintiffs, and that out of the annual profits thereof Rs. 48, representing interest on the principal mortgage-money at the rate of Re. 1 per cent., should be appropriated by them, and the balance, after payment of Government revenue and other expenses, be credited to the principal mortgage-money. On the 2nd April, 1880, the plaintiffs brought the present suit against Chauharja Singh, and against certain persons in possession of the mortgaged property, in which they claimed to recover Rs. 400, the principal mortgage-money, and Rs. 282-8-0 interest thereon from the 11th May, 1874, to the 31st March, 1880, at the rate of Re. 1 per cent., by enforcement of their lien on the mortgaged property. They alleged that the defendant Chauharja Singh had failed to put them in possession of the mortgaged property, and had not paid them the principal mortgage-money or interest; and that "the cause of action in respect of the principal amount accrued on the 11th May, 1874, and the amount of interest claimed became payable every year." The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendant Chauharja Singh the lower appellate Court dismissed the suit on the ground that the instrument of mortgage did not contain an hypothecation of the mortgaged property as security for the mortgage-money, and the claim was therefore not maintainable.

In second appeal the plaintiffs contended that they were equitably entitled to a decree against Chauharja Singh for the mortgage-money and interest.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—On the 11th May, 1874, Chauharja Singh, defendant-respondent, executed a usufructuary mortgage of certain shares to the plaintiffs-appellants for Rs. 400, and the instrument was duly registered on the 20th May following. By the mortgage it was agreed that the mortgagees should take possession of the shares hypothecated, and out of the income received therefrom appropriate Rs. 48 for interest, carrying the balance after payment of revenue and other expenses to the credit of the principal sum. The plaintiffs-appellants now bring their suit upon the allegation that the defendant-respondent never has given them possession, and they seek to recover Rs. 400 principal with Rs. 282-8-0 interest, by enforcement of lien against the ten annas share mortgaged. Certain other persons in possession of the property have been impleaded as defendants under s. 32 of the Procedure Code. The plaintiffs allege their cause of action to have accrued on the 11th May, 1874, and their claim is for Rs. 400 principal, and Rs. 282-8-0 interest from that date to the 31st March, 1880.

The Munsif decreed the claim in its entirety; but the Judge in appeal reversed this decision, holding that, as there was no hypothecation of the land mentioned in the mortgage-deed, the suit was unmaintainable. The plaintiffs mortgagees now appeal to this Court.

We concur with the Judge's view that there was no pledge of the shares, and that the plaintiffs-appellants are not entitled to ask for enforcement of lien. The defendants 2, 3, 4 and 5 have accordingly been exempted. But we think it inequitable to hold that the plaintiffs must therefore fail entirely in the present suit. The defendant has had the use of the plaintiffs' money ever since the execution of the mortgage, and has paid neither principal nor interest. By his tortious act in failing to give the mortgagees possession of the mortgaged land, he has been guilty of a breach of a contract in writing registered, for which the plaintiffs are entitled to compensation. It is true that the relief prayed in the plaint is not precisely asked in this form, but in treating the suit as one for damages, we can determine it upon a cause of action disclosed on

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the face of the pleadings, and in accordance with the evidence given in the case. In estimating the measure of damages to be decreed, we think we may fairly take the principal sum with interest at the rate specified in the contract as a reasonable guide. We accordingly decree the appeal as regards Chauharja Singh with costs, and decree the plaintiffs' claim for Rs. 628-8-0 against him.

Decree modified.

1880 *January* 26.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

DEO KISHEN AND ANOTHER (DEFENDANTS) *v.* MAHESHAR SAHAI AND OTHERS (PLAINTIFFS).*

Act X of 1877 (*Civil Procedure Code*), *s.* 561—*Time for filing objections.*

The notice of objections referred to in s. 561 of the Civil Procedure Code must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J., of the following question arising in this appeal :—

"Whether the law requires that the notice of objections referred to in s. 561 of the Civil Procedure Code shall be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties, or seven days before the date on which the first hearing of the case actually comes on?"

Mir *Zahur Husain*, for the appellants.

Munshi *Hanuman Prasad* and Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

The following judgment was delivered by the Full Bench :—

PEARSON, J. (STUART, C. J., OLDFIELD, J., and STRAIGHT, J., concurring).—The day fixed for the hearing of an appeal is that fixed under s. 552 of Act X of 1877 and that alone. The hearing of the appeal may be adjourned to another day, but the latter is not, in the language of the law, the day fixed for the hearing of the appeal, which is only the day originally fixed for that purpose. In ss. 555,

* First Appeal, No. 104 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 30th June, 1879.

556 and 557 the day originally fixed for the hearing is plainly and carefully distinguished from any other day to which the hearing may be adjourned. S. 561 requires a respondent to file any objection he may wish to take to a decree which is the subject of an appeal not less than seven days before the day fixed for the hearing of the appeal. The words "the date fixed for the hearing" in s. 561 correspond with the words "the day so fixed" in ss. 555, 556 and 557, and refer to the day fixed for the hearing under s. 552 of the Code.

No doubt a day to which the hearing has been adjourned is also a day fixed for the hearing: but in the law, as has been pointed out, "the day to which the hearing has been adjourned" is distinguished from "the day fixed for hearing," and cannot be included in the latter expression.

Some appeals may be heard on the day fixed for the hearing. In others the hearing may be once or twice or more frequently adjourned. That some respondents should only have one opportunity of filing objections, and that others should have two or three or more numerous opportunities of so doing, and that the number of these opportunities should depend upon the accidents which prevent a Court from hearing an appeal on the day originally fixed for the hearing or on the days to which the hearing may have been adjourned, is a proposition which does not recommend itself to approval. A fixed and not a variable time within which objections may be filed is what the law may reasonably be understood to have established.

APPELLATE CIVIL.

1881.
July 1.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

PHUL KUAR (DEFENDANT) *v.* SURJAN PANDEY AND OTHERS (PLAINTIFFS).*

Evidence—Examination of witnesses—Mode of taking evidence.

Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case.

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* First Appeal, No. 143 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 22nd September, 1880. Reported under the order of the Hon'ble the Chief Justice.

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PHUL KUAR v. SURJAN PANDEY.

FOR the purposes of this report it is sufficient to set forth the order of the High Court remanding the case to the lower appellate Court for the taking of additional evidence.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

The Court (STUART, C. J., and TYRRELL, J.,) made the following order :—

STUART, C. J.—This case has been most inadequately tried, and the manner in which the evidence has been taken is most discreditable, although perhaps it is not much worse than the depositions taken in the districts usually are. In fact taking and recording evidence is a judicial duty which in these Provinces is performed in a manner which to say the least is most perfunctory, so much so as to make the so-called depositions in many if not in most cases utterly useless for the purposes of justice. The want of skill in this respect is specially and sadly observable in Native Judges, who seem altogether unacquainted with the manner in which witnesses should be examined. A witness's cause of knowledge of the facts to which he deposes is scarcely ever shown, and it is not too much to say that nine-tenths of the depositions which are brought before us scarcely contain a single word of evidence properly so-called. Nor as a rule are the parties themselves to a suit examined, although they must necessarily be best acquainted with the facts of their own case.

Even in this High Court pleaders of eminence and of undoubted ability and learning are often seen to read and to argue with all the composure of the most serious advocacy on the miserable contents of such worthless documents. In fact many judicial officers and pleaders, certainly those in the districts, seem utterly ignorant on the subject of evidence, and anything like the logical development of a witness's knowledge of facts is a legal *desideratum* which we fear it is hopeless to expect. We are all painfully familiar with the too ingenious resources of the "bazar witness," the ready ubiquity of whose persons, minds, and memories is so remarkable, yet scarcely more so than the easiness of the terms on

which, in popular estimation, their singular gifts may be procured. Indeed it would be difficult to account for the incredible and at best questionable contents of many a "deposition" excepting on this "bazar" theory. Again, we are informed that it is the practice of judicial officers, in many districts, to commit the important and delicate function of taking evidence to native muharrirs. Such a practice indeed, if it does really exist, is most disgraceful, and any judicial officer whether European or Native who avails himself of it is utterly unfit to conduct the business of a Court of Law. It is the duty of all classes of presiding Judges to require that evidence in all litigated cases in which the facts are disputed shall be clearly and carefully taken before themselves, and for a Judge to depute this duty, or any part of it, to any inferior officer of his Court is simply gross misconduct in his office.

In the present case the main question at issue was that of the simple fact of the parentage of the appellant Phul Kuar. No attempt has been made to elicit from the witnesses examined on both sides any real or precise testimony on this question. Nothing has been done beyond recording in terms far from explicit statements of one set of persons affirming generally the plaintiff's case and of another set of persons contradicting it. We are constrained therefore to require the Court below to take and record evidence on the above question under the terms of ss. 568 (*b*), 569, and 570 of the Civil Procedure Code on the following questions:— What is the exact age at present of Phul Kuar; in what year and at what age did Raghunath Pandey die; what is the age of Kahlasi; what is the age of Ishri Pandey; and of the mother or mothers of his children; what children have been born to Ishri Pandey; what are their ages if living, or at what age and in what year they died? The plaintiffs and the defendant should be examined, as should also Ishri Pandey if still alive, if not his widow and his sons, on these points, as well as other witnesses who may be properly produced before the Court. And when all this evidence has been taken it will, along with the record, be returned to this Court for the final disposal of the appeal.

Issues remitted.

1881
August 26.

Before Mr. Justice Straight and Mr. Justice Duthoit.

MANNA SINGH (PLAINTIFF) *v.* RAMADHIN SINGH (DEFENDANT). *

Pre-emption—Joint purchase by co-sharer and strangers—Specification of interests taken by purchasers.

A co-sharer of an estate sold his share to *R*, who was also a co-sharer in such estate, and to two other persons, who were not co-sharers, but "strangers," selling it to all of them jointly and collectively, for one integral sum as the consideration for the whole. The deed of sale specified that each of the purchasers took a one-third share of the property sold. The co-sharers of the estate were entitled, on the sale by a co-sharer of his share, to the right of pre-emption. *Held* that such specification could not alter the joint nature of the sale transaction or permit of its being broken up and treated as involving three separate contracts, so as to entitle *R*, as a co-sharer having an equal right of pre-emption, to resist, so far as one-third of the property was concerned, a claim by another co-sharer to enforce a right of pre-emption in respect of such sale, but *R* must be regarded as a "stranger" in respect of the whole of the property sold by reason of his having associated himself with "strangers." *Guneshee Lal* v. *Zarauf Ali* (1) observed on.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of a sale under an instrument dated the 11th February, 1880, of four shares, in four villages, basing his claim on the *wajib-ul-arz*, which gave co-sharers a right of pre-emption as against "strangers," that is to say, persons who were not co-sharers. From the body of the instrument of sale it appeared that these four shares had been sold to the defendants-vendees for a lump sum of Rs. 500 in manner following; that is to say, "one-third to Ramadhin, one-third to Ramapat, and one-third in equal shares to Shiupal and Madho Singh." The defendants-vendees were all "strangers" except Ramadhin, who was a co-sharer in the villages in question, and thus had a right of pre-emption equal to the plaintiff's right. In giving the plaintiff a decree, the Court of first instance held that the plaintiff had no right of pre-emption as regards the one-third share purchased by the defendant Ramadhin, and accordingly gave the plaintiff a decree for a two-thirds share only of the shares in suit conditional on payment within a certain time of a proportional amount of the purchase-money. On appeal by the plaintiff it was contended on his behalf that, as the

* Second Appeal, No. 144 of 1881, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 22nd November, 1880, affirming a decree of Babu Promoda Charan Banerji, Munsif of Allahabad, dated the 22nd July, 1880.

(1) N.-W. P. H. C. Rep., 1870, p. 343.

defendant Ramadhin had associated "strangers" with himself in the purchase of the shares in suit, he must be regarded as a stranger, and the plaintiff was entitled to the whole of such shares. The lower appellate Court disallowed this contention, observing as follows:— "The first plea is based on a ruling of the High Court for the North-Western Provinces in *Guneshee Lal* v. *Zaraut Ali* (1), but that case is essentially distinguishable from the present case, wherein the specification of the several interests purchased is an integral part of the contract between the parties to the sale on both sides."

The plaintiff appealed to the High Court, again contending that the defendant Ramadhin should be regarded as a stranger, so far as the plaintiff was concerned, by reason of having associated himself with strangers; and that the case cited by the lower appellate Court was not distinguishable from the present case.

Munshi *Ram Prasad* and Babu *Ram Das Chakarbati*, for the appellant.

Mr. *Colvin*, for the respondent.

The Court (STRAIGHT, J., and DUTHOIT, J.) delivered the following judgments:—

DUTHOIT, J.—The question at issue in this appeal is whether a claim for pre-emption, founded on the terms of a village administration-paper, has or has not been rightly dismissed by the Courts below as regards part of the property conveyed, because one of the part-purchasers was at the time of the sale a co-sharer—the title under which he was so has, it appears, been since defeated—in the estate, and possessed therefore, as regards that part of the property, a right to purchase equal to that of the would-be pre-emptor.

The law regarding the right of pre-emption under a sale to co-sharers associated with strangers has been laid down for these Provinces in *Sheodyal Ram* v. *Bhyro Ram* (2) and in *Guneshee Lal* v. *Zaraut Ali* (1).

The former authority does not appear to have been referred to in the lower appellate Court, but the latter was, and was held to be distinguishable, on the ground that in the present case a specification of the shares of the purchasers was part of the transaction,

(1) N.-W. P. H. C. Rep., 1870, p. 343. (2) N.-W. P. S. D. A. Rep., 1860, p. 53.

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whereas in the document with which the decision of this Court of 1870 was concerned there was no such specification.

The record of Special Appeal No. 657 of 1870 has been examined. It contains a translation of the deed of sale then under reference. The only difference, as regards the point in question, between that document and the one now under consideration is that in the deed now before us the specification of the shares of the vendees in the purchased property is stated in the body of the instrument, whereas in the deed which was under consideration in 1870 the specification was contained in a schedule at foot. But as that schedule was referred to in the body of the instrument, and the sale was declared to be "according to the specification contained in the schedule at foot," the schedule clearly became for the purpose under reference part and parcel of the instrument, and that being so, I fail to see how the present case and the case of 1870 are to be distinguished. I would decree the appeal with costs.

STRAIGHT, J.—The contract of sale was a joint one and the consideration joint. The mere mention of the proportion in which the vendees were to take the property cannot alter the nature of the transaction, nor permit of its being broken up and treated as involving three separate contracts. The defendant-respondent Ramadhin, though a co-sharer, having associated strangers with him in his purchase, stands in neither better nor worse position than they do as against a pre-emptor, and cannot avail himself of his privileges under the *wajib-ul-arz*. I concur with my brother Duthoit that this appeal should prevail, and decreeing it with costs I would allow the plaintiff-appellant's claim in its entirety.

Appeal allowed.

CIVIL JURISDICTION.

1881
November 14.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

KHUNNI (PLAINTIFF) *v.* NASIR-UD-DIN AHMAD (DEFENDANT).*

Registered bond for the payment of money—Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 116.

Held, following *Husain Ali Khan* v. *Hafiz Ali Khan* (1), that a suit on a registered bond for the payment of money, which has not been paid on the due date, is a suit for compensation for the breach of a contract in writing registered, and therefore the limitation applicable to such a suit is that provided by No. 116, sch. ii of the Limitation Act.

The principle on which the ruling that a suit on a bond which has not been paid on the due date is a suit for compensation explained by STUART, C. J., and *Nobocoomar Mukhopadhaya* v. *Siru Mullick* (2) referred to.

THE plaintiff in this suit claimed Rs. 160, the principal amount and interest due on a registered bond, dated the 21st August, 1873. By the terms of this bond the principal amount was payable within six months from the date thereof, and the interest month by month. The suit was instituted on the 5th January, 1880. The appellate Court dismissed the suit, on the ground that it was barred by limitation, holding that No. 80 of sch. ii of Act XV of 1877 was applicable to it, and not No. 116 of the same schedule.

The plaintiff applied to the High Court to revise the decree of the appellate Court under s. 622 of the Civil Procedure Code, contending that the suit was within time, No. 116 of sch. ii of Act XV of 1877 being applicable to it.

Munshi *Hanuman Prasad,* for the plaintiff.

Mr. *Niblett,* for the defendant.

The Court (STUART, C. J., and BRODHURST, J.) delivered the following judgments:—

STUART, C. J.—This is an application for revision under s. 622, and the question raised appears to be the same as that which was

* Application, No. 67 of 1881, for revision under s. 622 of Act X of 1877 of a decree of Maulvi Sultan Hasan, Subordinate Judge of Agra, dated the 8th June, 1880, reversing a decree of Sayyid Munir-ud-din Ahmad, Munsif of Muttra, dated the 11th February, 1880. Reported under the orders of the Hon'ble the Chief Justice.

(1) *Husain Ali Khan* v. *Hafiz Ali Khan*, I. L. R., 3 All. 600.

(2) I. L. R. 6 Calc. 94.

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decided by a Full Bench ruling of this Court in a reference by Spankie, J., and Straight, J., where we unanimously held that the limitation period to be applied was six years under No. 116, sch. ii of the present Limitation Act (1). I do not appear in my judgment in that case to have gone very fully into the argument maintained in the present case, contenting myself with holding that the document there, whatever its form, was clearly a contract of the kind contemplated by No. 116. The other Judges, particularly the two referring Judges, give reasons for their opinion that the suit should be regarded as really one for compensation, and an English case decided by the Court of Common Pleas was referred to as showing that the addition to the demand on a bond of unascertained interest was sufficient to make it an unliquidated claim, and therefore recoverable only in a suit for damages. But the true principle to be applied to a case like the present is referred to in a judgment of Mitter, J., in a Calcutta case— *Nobocoomar Mukhopadhaya* v. *Siru Mullick* (2)—where his opinion manifestly was that the time conditioned for by the bond having gone by before the suit was brought specific performance was impossible, and the only remedy was for compensation or damages. It has also been explained to us that that is the principle usually applied in similar cases on the original side of the Calcutta Court. And I am satisfied it is the right principle. In the present case the bond sued on is dated so far back as the 21st August, 1873, and it provided that the obligor should pay the money or principal sum to the obligee within six months, and the interest month by month, yet the suit on such a bond is not instituted till the 5th January, 1880, when the possibility of its exact performance was passed and gone. The suit therefore can only be regarded as one for compensation or the equivalent for the debt in damages. No. 116, sch. ii of the Limitation Act, clearly applies, and the limitation period is six years. I would therefore allow the revision applied for, and set aside the judgment of the lower appellate Court, and remand the case for disposal on the merits by the Subordinate Judge.

BRODHURST, J.—I concur with the learned Chief Justice that the judgment of the lower appellate Court must be set aside, and

(1) *Husain Ali Khan* v. *Hafiz Ali Khan*, I. L. R., 3 All. 600.

(2) I. L. R. 6 Calc. 94.

that the case must be remanded for trial on its merits as it is not barred by limitation, being governed, not by art. 80, but by art. 116, sch. ii, Act XV of 1877, as found by the Court of first instance.

Cause remanded.

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1881 *December* 14.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BAHRAICHI CHAUDHRI (DEFENDANT) *v.* SURJU NAIK AND ANOTHER (PLAINTIFFS.)*

Mortgage—Decree enforcing lien—Suit against purchaser to enforce decree—Act X of 1877 *(Civil Procedure Code), s.* 43

The obligee of a bond for the payment of money, in which certain property was mortgaged as collateral security, sued the obligor for the money due on such bond, claiming the enforcement of such mortgage. At the time the suit was brought such property was in the possession of a third person, who had purchased it at a sale in execution of a money-decree against the obligor of such bond. The obligee did not make the purchaser a defendant to the suit. He obtained a decree in the suit for the sale of such property. Being resisted in bringing it to sale by the purchaser, he sued the purchaser to have it declared that such property was liable to be sold under his decree. *Held* that such second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

ON the 21st January, 1878, the defendant in this suit purchased the rights and interests of six brothers in an eight annas share of a village called Kukrali, which were put up for sale in execution of a decree for money dated the 1st February, 1877. Of these six brothers three had, prior to the date last mentioned, given a bond for money to the plaintiffs in this suit, hypothecating their rights and interests in such share. On the 8th November, 1878, the plaintiffs in this suit brought a suit on such bond against the obligors and obtained a decree thereon against them and the hypothecated property. They subsequently caused the eight annas share in Kukrali to be attached in execution of this decree. The defendant objected to the attachment and sale of such share, and his objections were allowed. Thereupon the plaintiffs brought the present suit against the defendant to have it declared that such share was liable to be sold in execution of their decree. Both the lower Courts gave the plaintiffs a decree.

* Second Appeal, No. 378 of 1881, from a decree of R. F. Saunders, Esq., Judge of Gorakhpur, dated the 7th January, 1881, affirming a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 22nd July, 1880.

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In second appeal by the defendant it was contended on his behalf that the suit was not maintainable, regard being had to the provisions of s. 43 of Act X of 1877, as the plaintiffs should have included in the former suit brought by them on their bond the present claim against the defendant, who had purchased the hypothecated property, and should have made him a defendant in that suit; and that the plaintiffs were only entitled to bring to sale the interests of the obligors of their bond in the share in question, and not the entire share.

Pandit *Ajudhia Nath* and Maulvi *Mehdi Hasan*, for the appellant.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondents.

The Court (OLDFIELD, J., and BRODHURST, J.) made the following order remanding the case to the lower appellate Court to determine the extent of the interests in the share in question of the obligors of the bond:—

OLDFIELD, J.—The first contention in appeal is that the suit is not maintainable with reference to the provisions of s. 43, Act X of 1877. The argument is that the plaintiff should have included in his claim in the suit brought against his obligors the present claim against defendant, who had purchased the hypothecated property, and should have made him a defendant.

The contention is quite untenable. All that s. 43 says is that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." His cause of action in the former suit arose under the bond and gave a claim against the obligors only, and there was no necessity to make any other persons defendants. The present claim against the defendant, who purchased the interests of the obligors in the hypothecated property, is a distinct claim in respect of a distinct cause of action.

The second plea is, however, valid. The plaintiff obviously has only a right to bring to sale the interest held by his obligors in the eight annas. It is contended that the eight annas share belongs to the six brothers, and that the plaintiff's obligors have only a four anna interest out of the said eight annas. The lower appellate Court must determine the amount of interest which the plaintiff's obligors

held. We remand the case for trial of this issue and allow ten days for objections to be made to the finding and will then dispose of the other pleas taken in appeal.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1882 *January* 13.

BHUREY MAL (DEFENDANT) *v.* NAWAL SINGH (PLAINTIFF).*

Pre-emption—Co-sharer joining relatives with him in claiming right—Effect on co-sharer's right—Stranger.

A co-sharer of an estate, who has a right of pre-emption, does not, merely by joining with himself members of his family, who are not co-sharers in such estate, in a suit to enforce such right, defeat such right. *Manna Singh* v. *Ramadhin Singh* (1) distinguished.

THE plaintiffs in this suit claimed possession as mortgagees of a certain share in the thoke of a mahál called Multan, basing their claim upon the *wajibularz*. That document provided that, in the event of a co-sharer desiring to sell or mortgage his share, he should offer it in the first instance to his "brothers;" secondly, to "near cousins"; thirdly, to co-sharers in his thoke; and, fourthly, to co-sharers in the mahál; after which he might offer it to strangers. The mortgage in respect of which the plaintiffs claimed was one by the widow of Sahuria, the deceased proprietor of the share in question. She had given a possessory mortgage of the share to the defendant Bhurey Mal. The latter was a co-sharer in thoke Multan, but was not a blood relation of Sahuria. The plaintiffs, Bahal Singh, Dal Singh, and Nawal Singh, were severally a second cousin, a third cousin, and a fifth cousin of Sahuria. Nawal Singh was the only plaintiff who was a co-sharer in thoke Multan. The Court of first instance gave the plaintiffs a decree for possession of the share in question as mortgagees. On appeal by the defendant Bhurey Mal, the lower appellate Court held that the plaintiffs Bahal Singh and Dal Singh should not have been included in this decree, as though near cousins of Sahuria, within the meaning of the *wajibularz*, they were not co-sharers in thoke Multan, and therefore had not, under that instrument, a preferential right to that of the defendant Bhurey Mal. Holding, however, that the plaintiff Nawal

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* Second Appeal, No. 624 of 1881, from a decree of R.M. King, Esq., Judge of Saháranpur, dated the 16th February, 1881, modifying a decree of Maulvi Kazim Ali, Munsif of Shamlí, dated the 30th September, 1880.

(1) See *ante*, p. 252.

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Singh, as a "near cousin" and a co-sharer in that thoke, had a better right to the mortgage than the defendant Bhurey Mal, it affirmed the decree of the first Court as regards the former. With regard to the defendant's contention that the plaintiff Nawal Singh had lost his right by associating "strangers" with him in his claim, the lower appellate Court held that the plaintiffs Bahal Singh and Dal Singh were not "strangers," and therefore the plaintiff Nawal Singh had not lost his right by associating them with himself in his claim.

On second appeal to the High Court the defendant Bhurey Mal again contended that the plaintiff Nawal Singh had lost his right by associating the other plaintiffs with himself in his claim, as they were "strangers."

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Sukh Ram*, for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondent.

The judgment of the Court (BRODHURST, J., and TYRRELL, J.) was delivered by

TYRRELL, J.—None of the pleas are sustainable. The last plea has no cogency, as the respondent, having joined with him certain members of his family, who are found to be strangers *quoad* the estate, has not merely by so doing defeated his pre-emptive right as asserted in this suit. His position is distinguishable in this respect from that of the purchaser whose case was before this Court in *Manna Singh* v. *Ramadhin Singh* (1). The principle laid down in that ruling is therefore inapplicable to the case now before us. The appeal is dismissed with costs.

Appeal dismissed.

(1) See *ante*, p. 252.

FULL BENCH.

1882
January 16.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, and Mr. Justice Tyrrell.

RAM SEWAK SINGH AND OTHERS (PLAINTIFFS) *v.* NAKCHED SINGH (DEFENDANT).*

Act X of 1877 (*Civil Procedure Code*), *ss.* 13, 43—*Act I of* 1877 (*Specific Relief Act*), *s.* 42—*Res judicata—Misjoinder.*

In December, 1878, *H*, a Hindu widow, in possession, by way of maintenance, of a certain estate, of which *R* owned one-third, and *P*, *B*, and *S* one-third, jointly, made a gift thereof to *N*. *H* died in January, 1879. In February, 1879, *R* and *P*, *B*, and *S* joined in suing *N* for a declaration of their proprietary right to two-thirds of the estate and to have the deed of gift set aside. The Court trying this suit treated it as one for a mere declaration of right, and dismissed it, with reference to the provisions of s. 42 of the Specific Relief Act, 1877, on the ground that the plaintiffs had omitted to sue for possession, although they were not in possession and were able to sue for it. In November, 1879, *R* and *P*, *B*, and *S* again joined in suing *N*. In this suit they claimed possession of two-thirds of the estate and to have the deed of gift set aside.

Held by the Full Bench (reversing the judgment of PEARSON, J., and affirming that of OLDFIELD, J.,) that the decision in the first suit was no bar to the determination in the second suit of the question as to the validity of the deed of gift.

Per STUART, C. J., and STRAIGHT and OLDFIELD, JJ., that the causes of action in the two suits being different, the second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Per TYRRELL, J., that the plaintiffs being entitled to only one remedy in the former suit, the provisions of s. 43 were not applicable to the second suit.

Held by the Full Bench that there was no misjoinder of plaintiffs in the second suit.

S. A. No. 1050 of 1879 distinguished (1).

THE plaintiffs in this suit joined in suing the defendant for possession of two-thirds of a four-anna share of two villages (the plaintiff Ram Sewak Singh claiming one-third, and the remaining plaintiffs, Puran Singh, Bhagwant Singh, and Raghunandan Singh, one-third), and to have a deed of gift of such share, bearing date the 10th December, 1878, executed in the defendant's favour by one Hiseba Kuar, set aside. The plaintiffs had formerly sued the

* Appeal, No. 3 of 1881, under s. 10 of the Letters Patent. Duthoit, J., was present at the hearing of this appeal, but had left the Court when judgment was delivered. He concurred in the judgment of Straight, J.

(1) Decided the 12th May, 1880; not reported.

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defendant for a declaration of their right to two-thirds of such share, and to have such deed set aside. The Court trying this former suit, finding that the plaintiffs were not in possession of such share, dismissed the suit on the 30th May, 1879, having regard to the provisions of s. 42 of the Specific Relief Act, 1877, on the ground that they were not entitled to the relief claimed, being in a position to claim further relief in the shape of possession of the share. The defendant set up as a defence to the present suit, *inter alia*, that the plaintiff Ram Sewak Singh, being separate in estate from the other plaintiffs, there was misjoinder of parties, and that the suit was barred by the provisions of ss. 43 and 13 of the Civil Procedure Code. The Court of first instance held that the frame of the suit was bad, there being misjoinder of plaintiffs and of causes of action; and that as the plaintiffs had omitted to sue for possession in the former suit, they were debarred from suing for it in the present suit by the provisions of s. 43; and dismissed the suit. On appeal by the plaintiffs the lower appellate Court agreed with the Court of first instance that the frame of the suit was bad by reason of misjoinder of plaintiffs and causes of action, and that the suit was barred by s. 43. On second appeal by the plaintiffs to the High Court the Divisional Bench (PEARSON, J., and OLDFIELD, J.) before which the appeal came for hearing differed in opinion on the point whether the suit was or was not barred by s. 13. The Bench delivered the following judgments:—

PEARSON, J.—The finding in the former suit that the plaintiffs were not in possession of the property claimed by them was, I take it, a finding that the defendant was in possession thereof under the deed of gift which they sought to set aside. The dismissal of that suit precludes them, I conceive, from again suing for the avoidance of that deed, and without avoiding it they cannot be entitled to oust the defendant. I am therefore constrained to hold that the present suit is unmaintainable, and would dismiss the appeal with costs.

OLDFIELD, J.—The plaintiffs in their plaint aver that a four annas share in the mauzas Bamhanpur and Juahpur is ancestral property of the parties to this suit, and that they placed Hiseba Kuar, widow of Ram Narain, one of the brotherhood, in posses-

sion of the said four annas share for her life without power of alienation. In July 1871 she gave a lease of four annas in Bamhanpur and the lessee is in possession, and on the 10th December, 1878, she made a gift of the above shares in both mauzas to defendant. She died in the January following (Pus, Sambat 1931): the four annas share in Bamhanpur is in possession of the lessee, and since her death there have been disputes between plaintiffs and defendant as to the four annas in Juahpur, and hence plaintiffs have not been able to realize the rent, and defendant asserts the property to be his on the strength of the deed of gift. Plaintiffs allege that their cause of action for this suit arose on the death of the lady; and they seek to be put in possession of a two annas eight pies share in Bamhanpur and in Juahpur, and that the deed of gift be declared null and void as far as it affects their property.

It appears that plaintiffs brought a suit against defendant on the 18th February 1879, in which they sought merely to have the said deed of gift declared null and void as far as it affected their interests. In their plaint they averred that defendant did not get possession of the four annas conveyed prior to the lady's death; and that on her death both parties were jointly in possession of their shares, and they alleged their cause of action arose on the execution of the deed of gift, which had thrown a cloud on their title. The Subordinate Judge dismissed the former suit without adjudication on the merits on the ground that it was a suit for a declaration of a right in property, and not maintainable under s. 42 of the Specific Relief Act, since he held that the plaintiffs were out of possession at the time they instituted the suit, and should sue for possession.

The Judge has now dismissed the present suit on the grounds of misjoinder of plaintiffs, and that it is barred under s. 43 of the Civil Procedure Code.

I am unable to hold that there is any misjoinder. The plaintiffs, though owning different shares in the property, are alike affected by the deed of gift and acts of obstruction of the defendant to their possession, and many join in bringing the suit (s. 26, Civil Procedure Code).

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The second point is of some difficulty. The Subordinate Judge was, in my opinion, in error in looking on the former suit as one for a mere declaration of a right in property coming within the provisions of s. 42 of the Specific Relief Act. It was a suit for consequential relief, *i.e.*, to have declared void a deed of gift so far as it affected plaintiffs' interests in the property; that is something more than a mere declaration that plaintiffs had certain rights in property. Had the suit been of the nature of one under s. 42 of the Specific Relief Act, I should hesitate to hold that the provisions of s. 43 of the Civil Procedure Code applied to it. Whether, however, the former suit be regarded as one for a declaration of a right coming within the meaning of s. 42 of the Specific Relief Act, or as one for consequential relief, s. 43 of the Civil Procedure Code would only apply to bar that part of the claim omitted in the former suit, *i.e.*, the remedy for possession ; it would be wrong with reference to s. 43 alone to dismiss the whole claim. But it appears to me that s. 43 is not applicable to the claim for possession, since that remedy is based on a different cause of action to that on which the former suit was based.

In the former suit plaintiffs sued merely to set aside the deed of gift executed by Hiseba Kuar in favor of defendant, which they sought to avoid as clouding their title; the execution of that deed was their cause of action, and it did not entitle them to sue for possession. Now they ask to be put in possession, and allege that the defendant has obstructed them in obtaining possession, by wrongfully preventing their enjoyment of the rents, and these obstructions which plaintiffs now complain of having received at the hands of defendant appear to have arisen subsequently to the institution of the former suit, which was brought immediately after Hiseba Kuar's death, and to be of the nature of a continuing wrong, and afford a fresh cause of action. The claim for possession then is not affected by s. 43, and that for cancelment of the deed of gift could only be barred, if the former decision could be considered as finally deciding it under s. 13 of the Civil Procedure Code, which is not the case. I would reverse the decrees and remand the case for trial on the merits: costs to follow the result. I cannot hold that the decision refusing to determine the claim in

the former suit on the ground that it was a claim for a declaration of a right, which the Court refused in its discretion to consider, was a final decision of the question of the validity of the deed of gift within the meaning of s. 13 of the Civil Procedure Code.

The plaintiffs, under s. 10 of the Letters Patent, appealed to the Full Court from the judgment of Pearson, J., contending that the suit was not bad for misjoinder, and neither was it barred by the provisions of either s. 13 or s. 43 of the Civil Procedure Code.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

The following judgments were delivered by the Full Court :—

STRAIGHT, J.—This is an appeal under s. 10 of the Letters Patent from a decision of Mr. Justice Pearson, lately a Judge of this Court, dated the 2nd February, 1881, dismissing the special appeal of the plaintiffs-appellants on the ground that their suit was barred by s. 13 of the Civil Procedure Code. The following are the only facts necessary to be stated in order to enable us to determine the two questions of law raised by the plea taken in the petition of appeal. In 1879 the appellants brought a suit for a declaration of their right to certain property, and to set aside a deed of gift relating thereto executed by one Hiseba Kuar to the defendant-respondent. The Subordinate Judge before whom the case came, whether rightly or wrongly it is not now necessary to decide, regarding the claim of the appellants as for specific relief under s. 42 of Act I of 1877, and holding that they were in a position to ask for further relief than a mere declaration of title, dismissed the suit on the 30th May, 1879, and no appeal was preferred against his decision. On the 27th November, 1879, the appellants commenced the present suit, which is for a declaration of their right to, and possession of, the property in question, by avoidance of the deed of gift already mentioned. The lower Courts dismissed it, being of opinion that there was a misjoinder of plaintiffs and causes of action, as also that possession, not having been asked by the plaint in the former litigation, could not now be claimed, having regard to the prohibition of s. 43 of the Civil Procedure Code.

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The second appeal to this Court was heard by Pearson and Oldfield, JJ., between whom there was a difference of opinion. Pearson, J., held that, as in the former suit it was found that the plaintiffs were not in possession of the property, but that the defendant was in possession thereof under the deed of gift, the dismissal of that suit precluded them from again suing for the avoidance of that deed. He therefore obviously, though not in explicit terms, held their present claim *res judicata*. Oldfield, J., was of a contrary opinion, and would have remanded the case for disposal on the merits. The plaintiffs now appeal, and their simple contention is that they are not barred either by ss. 13 or 43 of the Civil Procedure Code. I am clearly of opinion that this plea has force and must prevail. Whether the view of the Subordinate Judge as to the former suit was or was not correct is indifferent to our determination of the points before us. Rightly or wrongly he held the then claim of the appellants to amount to nothing more than a prayer for specific relief under s. 42 of the Specific Relief Act. It was solely for the purpose of satisfying himself as to whether the proviso to that section tied his hands that he entered into the question of possession, and his decision upon this point was a purely incidental one for that purpose, and that purpose only. As the law originally stood, the appellants would not have been entitled to a declaratory decree, unless they had possessed an existing right to consequential relief in a Court of Law. Act I of 1877, however, entirely changed the position, and it is now enacted by statute that when a plaintiff can seek further relief than a mere declaration of title, and omits to do so, he shall not be permitted to avail himself of the benefit of the provisions of s. 42 of the Specific Relief Act. The powers thereby given to the Courts are of a purely discretionary character, fettered always by the proviso above mentioned. The determination of a question of possession to enable a Court to decide whether it shall exercise its discretion under that section, or whether the prohibition exists against its doing so, cannot in my opinion be held a final decision of a "matter directly and substantially in issue in a former suit between the same parties." I therefore think that the view of Pearson, J., as to the applicability of s. 13 of the Civil Procedure Code to the present claim of the appellants was an erroneous one and cannot be sustained.

It only remains to be seen whether s. 43 was rightly held by the lower Court to bar the claim. Now it is to be observed that the basis upon which the appellants rested their former prayer for relief was the execution of the deed of gift of the 10th December, 1878, by which they declared their rights had been interfered with. They made no claim for possession of their shares, because at that time no act had been done by the respondent amounting to the assertion of a possession adverse to their title; and, indeed, as will be seen from their plaint, they plainly intimated that, as regards one of the villages in which they claimed a share, it was in the possession of the respondent under a lease, to which they took no objection, and as to the other, that they were in joint possession with him. It is obvious, therefore, that, while at the time of the institution of the former litigation their cause of action was the deed of gift, when the present suit was brought something more had accrued to them by reason of the obstruction offered by the respondent to their exercising the right of proprietorship over their shares. In the one case, no possession having been asserted by the respondent, the appellants were not entitled to sue him for possession; in the other case an additional cause of action had arisen, which gave them the right to the further remedy. Under these circumstances it does not appear to me that the appellants have laid themselves under the prohibition of the third paragraph of s. 43 of the Civil Procedure Code. At the hearing a decision of Stuart, C. J., and Pearson, J., in Special Appeal No. 1050 of 1879 was quoted by Pandit Bishambhar Nath for the respondent, as being a strong authority in favour of his view, and at first sight this would seem to be so. But upon examination of the judgments, they can scarcely be regarded as laying down any general principle, but rather as dealing with the particular circumstances of the individual appeal in which they were delivered. Whether this be the correct view of them or not, there is this broad distinction between that case and the present, namely, that there the plaintiffs were not only out of possession, but had intentionally omitted to sue for it, though they were in a position to do so, while here the cause of action, namely, the respondent's assertion of a proprietary right to the village Bamhanpur had not accrued to the appellants at the time of the institution of the for-

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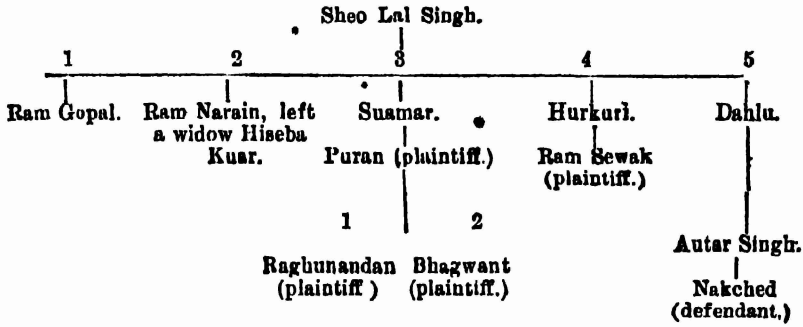
mer suit, so as to impose upon them the obligation to ask possession from him, they then only considering him in possession of that village as a lessee.

The objection on the ground of misjoinder was not seriously pressed by the respondent's pleader, and has obviously no weight.

The appeal must therefore be decreed, and the case remanded to the first Court under s. 562 for disposal on the merits: costs to abide the result.

TYRRELL, J.—The following table exhibits the family relations of the parties to this suit:—



Ram Gopal died without issue, and left no widow. Ram Narain also had no issue; but at his death he left a childless widow, Hiseba Kuar. For many years this lady had possession and enjoyment of the family estate consisting of a four-anna share in two villages. On the 10th December, 1878, Hiseba Kuar affected to convey this estate by gift to her grand-nephew, Nakched, executing a deed of gift in his favour: and she died in January, 1879. The heirs of the other brothers of Hiseba's husband promptly proceeded at law to rid their inheritance of the effects of this transaction; and on the 8th February, 1879, they brought a suit to have the deed of gift in favour of Nakched set aside in respect of their two-thirds share in the estate. The plaintiffs alleged that possession had remained with Hiseba Kuar to the date of her death, and that on her demise her donee, the defendant, had wrongfully assumed joint possession with the plaintiffs in their shares of the estate: but they made no claim for relief with reference to possession. This suit was dismissed on the 30th May, 1879, on the ground that "as the plaintiffs were found not to be in possession of the said two-thirds share, and

as by merely suing for the voidance of the deed of gift, they impliedly sought to obtain a decree declaratory of their proprietary right to the two-thirds share, their suit was opposed to the proviso of s. 42 of Act I of 1877." That proviso is that "no Court shall make any declaration of status or right where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The further relief which the Court found the plaintiffs to be then able to seek was the possession of their two-thirds of the estate: and that suit as brought for a remedy under the scope of the Specific Relief Act was rightly dismissed. In other words, it was determined that the plaintiffs were not in February, 1879, persons entitled in respect of their claim to a "remedy" by way of a decree declaring the validity of their title and the invalidity of the pretensions of the defendant. The plaintiffs, having brought their suit of February, 1879, on the mistaken notion that they were entitled to a remedy by way of a declaratory decree, were practically taught their error by being non-suited in their action. They lost no time in applying this lesson, and brought their present suit (27th November, 1879,) for the establishment of their right to and for clear possession of their two-thirds shares in the ancestral estate, by annulment of the deed of gift in respect of the said shares made by the widow, having only a life-interest in the same, in favour of her grand-nephew, Nakched, the defendant. This suit also was dismissed because (*a*) the two sets of plaintiffs had each a separate share (one anna four pies) in the four-anna estate, the subject-matter of the suit, and the suit was therefore vitiated by misjoinder; and (*b*) because the plaintiffs were barred by the provisions of s. 43 of the Civil Procedure Code. On the former point the Court found that "in the present case there is not mere misjoinder of plaintiffs, there is also misjoinder of claims or causes of action. That which the plaintiff Ram Sewak claims, *i.e.*, a third share, is quite a separate subject from that which the other three plaintiffs claim, *i.e.*, another third share," in the two villages in suit. "Therefore the suit, being opposed to the proviso of s. 31 (Act X of 1877) in consequence of several plaintiffs being joined in respect of distinct claims and causes of action, cannot be heard." In this finding of law the Court was plainly wrong: and the error is due to the not uncommon confusion of "cause of action" and "subject-matter" of the suit.

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In this suit the plaintiffs had distinct and separate subject-matters of action, to wit their separate shares in the estate possessed for her life by the widow, but their cause of action was one and indivisible, that is to say, the act of the widow in alienating the property to Nakched to the jeopardy of the future rights of the plaintiffs as her reversionary successors to two-thirds of the estate. The plaintiffs therefore, though unconnected and separate in respect to the subject-matters of the suit, were conveniently and rightly joined in vindicating the one interest common to them all, centering in the main issue in the case, which was simply the nature and extent of the widow's dominion over the estate she admittedly possessed.

The Court was equally wrong in its finding on the objection to the suit taken by the defendant under s. 43 of Act X of 1877, the subject of the second issue framed for trial. It was decided on this subject that "in the former suit the plaintiffs omitted to claim possession; they cannot now sue for it": and the suit was accordingly dismissed with costs. Here again the provisions of the Civil Procedure Code were misunderstood and wrongly applied. The rule of s. 43 is the following: "A person entitled to *more* than *one remedy* in respect of the same claim may sue for all or any of his remedies: but if he omits to sue for any of such remedies he shall not afterwards sue for the remedy so omitted."

It is obvious that the test of the applicability of this rule is to ascertain if the person at the time he brought the former suit was in point of fact a person entitled to more than one remedy in respect of his claim. A remedy is a man's legal means of recovering or otherwise asserting a right to which he deems himself entitled, or of obtaining redress for a wrong. In s. 43, the second section of the Chapter on the "Frame of the suit," the word "remedy" is used to denote the decree or decretal order with its proper legal results, which is the successful suitor's warrant for obtaining the relief he has achieved by his suit. In the present case the Court had found when the first suit came before it that the plaintiffs were not persons entitled to the special form of remedy or relief they sought to obtain by that suit in respect of their claim, namely, the remedy by way of declaration of the unlawful character of the invasion of their reversionary rights and interest,

but that under the circumstances disclosed and ascertained in regard to the possession of the parties after the widow's death, the plaintiffs had no such remedy, and that their *only* remedy was by way of a suit for clearance of their title and removal of disturbance to their possession, that is to say, by bringing such a suit as the plaintiffs brought in November, 1879. It is not suggested that the plaintiffs had any other remedy than this, failing the mistaken one for which they were non-suited: and thus the action of the Court itself in the determination of the first suit cleared from the plaintiffs' path the obstruction of this provision of s. 43 of the Civil Procedure Code. It was then determined, and the decision has become final, that the plaintiffs were then "persons entitled in respect of their claim to one remedy only," and that they were mistaken in entertaining the belief to the contrary under which they had been led to bring the bad suit for another supposed remedy which was then dismissed. In this view of the law it was an error to defeat the plaintiffs on the threshold of their present suit with the objection that they were persons who, having been at the time of the first action entitled to more than one remedy in respect of their claim, had elected to sue for one remedy omitting the other remedy which they now seek to obtain in their present suit.

At and after the death of the widow and on the assumption by her donee of her possession the plaintiffs had no other remedy than that which they are now asking by the present suit, and they cannot be barred by a rule prohibiting persons who have in fact alternative remedies, and have elected to sue their adversaries on one of such omitting others, from bringing a suit for the omitted alternative relief. There being one remedy only to which the plaintiffs under the circumstances were entitled in February, 1879, there was no question of electing between alternative remedies, choosing the one and omitting another. The plaintiffs appealed to the district appellate Court against the decree dismissing their suit, and that Court in a short order affirmed the decree of the Court of first instance without assigning reasons for its concurrence.

In second appeal the Judges of the Division Bench differed in opinion, Pearson, J., dismissing the appeal in a judgment which took effect, while his colleague, Oldfield, J., would have reversed

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the concurrent decrees below, and remanded the case for trial on the merits. Hence the appeal now before us on the plea that "the suit as brought was neither open to the objection of misjoinder, nor barred by the provisions of ss. 13 and 43 of Act X of 1877."

The judgment impugned (Pearson, J.,) is as follows:—"The finding in the former suit that the plaintiffs were not in possession of the property claimed by them was, I take it, a finding that the defendant was in possession thereof under the deed of gift which they sought to set aside. The dismissal of that suit precludes them, I conceive, from again suing for the avoidance of that deed, and without avoiding it they cannot be entitled to oust the defendant. I am therefore constrained to hold that the present suit is unmaintainable, and dismiss the appeal with costs." The meaning of this judgment appears to be that the appellants' suit is barred as *res judicata* under Chapter I of the Code; and the judgment has been thus interpreted by Oldfield, J., and by the appellants before us.

The position is that the possession of the defendant under this deed of gift having been found as a fact in the first suit, the dismissal of that suit, which was for the avoidance of the deed of gift, makes the whole question of the validity of the defendant's title and of the legality of his possession *res judicata*. The propriety of this view seems to be questionable. The "matter in issue" in the first case was the validity of the defendant's pretensions, and the legality of his possession obtained by such pretensions. The alleged gift by the widow was the matter from which in itself and in connection with other matter, such as the extent and exact nature of her interest in the subject of the gift, the existence, non-existence, nature or extent of certain rights, liabilities, and disabilities asserted and denied in this suit necessarily followed (Evidence Act, s. 3). This matter never came to an issue at all; much less was it "heard and finally determined" in the first suit. The fact of the defendant's possession, which was not matter substantially or otherwise in issue, for it was alleged by both parties, the difference between them being not as to its existence, but as to its legal character and validity, was applied by the Court as the determining condition of the Court's competence to entertain the plain-

tiff's suit for a declaratory decree under Act I. of 1877. And the Court acting under the special and mandatory terms of s. 42 of that Act dismissed the suit by reason only of the fact of the plaintiffs being admittedly out of possession, and competent at the time to ask for possession. It appears to me that this decree can no more be deemed to be an adjudication of the very different matters really in issue in the sense of s. 13 of the Civil Procedure Code, namely, the rights and title to possession of the parties, than a decree would have been by which the suit had been dismissed for want of jurisdiction, supposing the plaintiffs by a misconception in regard of its true valuation had instituted their first suit in a Munsif's Court.

The bare fact of the defendant's possession was summarily found; but the question whether it was possession of inherent right, or as a trust, or by means of wrongful trespass, was no more determined than it would have been if the suit had been rejected under the conditions (*a*) or (*b*) of s. 54 of Act X of 1877. The first suit should indeed have been rejected under condition (*c*) of that section, as being on its face a suit for a declaratory decree barred as such by the positive rule of s. 42 of Act X of 1877 regarding the effect of non-possession, coupled with competence to seek for it, on such suits. And by the express terms of s. 56 of the Civil Procedure Code the rejection of the plaint on any of the grounds mentioned in s. 54 (and other sections) shall not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. The matters in issue in the suit before us are therefore in no respect *res judicata*, and neither the bar of that rule, nor the objection of misjoinder, was rightly applied to the appellants' suit.

I would therefore set aside the judgment and decree of the Division Bench and those of the Courts below, and affirming that of Oldfield, J., would remand the case to the Court of first instance to be tried on its merits according to law. The costs of this and the previous litigation should abide and follow the result.

STUART, C. J.—In this appeal from a Division Bench (Pearson, J., and Oldfield, J.,) I concur in the opinion of Oldfield, J., and dissent from that of Pearson, J. As one of the Judges who decided Second Appeal No. 1050 of 1879, dated 12th May, 1880, I explained at the hearing the distinction between that case and the

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present, and I entirely concur with my colleagues in what they have recorded on that subject. I may add a remark respecting a distinction which appears to be taken by the Subordinate Judge and the Judge below between misjoinder of plaintiffs and misjoinder of claims. There is really no sense or meaning in such a distinction. A plaintiff as such cannot be separated from his claim, and here the claims supposed to have been misjoined are absolutely identical in law and in fact; and even if we had not s. 31 of the Code of Civil Procedure, which provides that "no suit shall be defeated by reason of misjoinder of parties," no intelligible misjoinder could have been shown in the present case. The appeal from the Division Bench must be allowed, and the case remanded under s. 562 for disposal on the merits; costs will abide the result.

OLDFIELD, J.—I adhere to the view I took in my order dated the 2nd February, 1881.

Cause remanded.

APPELLATE CIVIL.

1882 *February* 3.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

NARSINGH SEWAK SINGH (JUDGMENT-DEBTOR) *v.* MADHO DAS AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Act XV. of 1877 (*Limitation Act*), *sch.* ii, *No.* 179 (2)—" *Where there has been an appeal.*"

The words "where there has been an appeal" in cl. 2, No. 179 of sch. ii of Act XV. of 1877, do not contemplate and mean only an appeal from the decree of which execution is sought, but include, where there has been a review of the judgment on which such decree is based, and an appeal from the decree passed on such review, such appeal.

Held, therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the Appellate Court, application was made for execution of the original decree, that time began to run, not from the date of that decree, but from the date of the decree of the appellate Court.

Sheo Prasad v. *Anrudh Singh* (1) distinguished.

IN March 1873 one Harak Chand Sahu sued one Ajudhia Prasad Singh and Rajnit Kuar, as the mother and guardian of her minor son, Rukman Sewak Singh, in the Court of the Subordinate Judge

* First Appeal, No. 123 of 1881, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 1st July, 1881.

(1) I. L. R. 2 All. 273.

of Benares for certain money. On the 23rd August, 1873, the Subordinate Judge gave him a decree against Ajudhia Prasad Singh and dismissed the suit against the minor. On the 3rd November, 1875, the heirs of Harak Chand Sahu, who had died in the meantime, applied for a review of judgment as regards the dismissal of the suit against the minor. This application was granted and the suit was re-heard, and a decree was given on the 29th November, 1876, to the heirs of Harak Chand Sahu against Narsingh Sewak Singh, as the heir of Ajudhia Prasad Singh, who had also died in the meantime, and against the minor. Being dissatisfied with this decree, the heirs of Harak Chand Sahu appealed to the High Court. On the 28th March, 1879, the High Court held that the review of judgment had been illegally granted, and dismissing the appeal "set aside the judgment and decree dated the 29th November, 1876." On the 17th May, 1880, the heirs of Harak Chand Sahu applied for execution of the decree dated the 23rd August, 1873. No application for execution of this decree had been made after the proceedings for review of judgment were instituted. Narsingh Sewak Singh, judgment-debtor, contended that the application was barred by limitation. The Court executing the decree held that the period of limitation should be computed, under No 179 (2) of sch. ii of Act XV of 1877, from the 28th March, 1879, the date of the High Court's decree, and the application was therefore within time. The judgment-debtor appealed to the High Court.

Mr. *Spankie* (with him Munshi *Kashi Prasad*), for the appellant, contended that the words in No. 179 (2), sch. ii of the Limitation Act, "where there has been an appeal," mean where there has been an appeal from the decree of which execution is sought. The decree of which execution is sought was not appealed, and time runs therefore from its date. He referred to *Sheo Prasad* v. *Anrudh Singh* (1).

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—The question is whether the decree-holder's application for execution of his decree is within time under art. 179,

(1) I. L. R., 2 All. 273.

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sch. ii of the Limitation Act. The decree was passed on the 23rd August, 1873, but a review of judgment was admitted and a decree passed on the 29th November, 1876, by which the original decree was altered. Then an appeal was preferred by the plaintiff from the decree passed on review, and on a cross objection taken by the defendant, the decree made on review was set aside by the High Court on the 28th March, 1879. We are of opinion that time will begin to run from the date of the decree of the High Court, as the final decree of the appellate Court within the meaning of art. 179 (2), sch. ii of the Limitation Act. It was contended that the appeal referred to in that article is an appeal from the original decree only, not an appeal from a decree passed on review of the original decree; but we are of opinion that this is not the case. The article makes limitation run, "where there has been an appeal," from "the date of the final decree or order of the appellate Court," and we think the appeal contemplated is an appeal in the suit, not necessarily an appeal from the original decree in the suit.

Our attention was drawn to a decision of this Court,—*Sheo Prasad* v. *Anrudh Singh* (1),—but that case is distinguishable from the one before us. In that case there had been no appeal from any decree. We therefore dismiss the appeal with costs.

Appeal dismissed.

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February 3.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BASDEO SINGH AND ANOTHER (PLAINTIFFS) *v.* MATA DIN SINGH AND ANOTHER (DEFENDANTS).*

Regulation XVII of 1806, *s.* 7—*Notice of foreclosure not signed by Judge—Invalidity of foreclosure proceedings.*

A notice issued under Regulation XVII of 1806, which does not bear the signature of the District Judge, but bears the seal of his Court only, is informal and bad, and the foreclosure proceedings in which such a notice has issued are invalid *ab initio*.

THE plaintiffs in this suit claimed to enforce a right of pre-emption in respect of a conditional sale of certain shares in two villages

* Second Appeal, No. 775 of 1881, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 19th March, 1881, affirming a decree of Mirza Kamar-ud-din, Munsif of Azamgarh, dated the 30th September, 1880.

(1) I. L. R., 2 All. 273.

which had been declared absolute on the 30th November, 1877, under Regulation XVII of 1806. These shares having been purchased at an execution-sale by one Phula during the year of grace allowed by that Regulation, she was made a defendant to the suit under s. 32 of the Civil Procedure Code. She set up as a defence to the suit, *inter alia*, that the notice of foreclosure required by that Regulation had not been duly served on the conditional vendor, one Jeo Lal Singh; that the foreclosure proceedings were therefore invalid and the conditional sale had not become absolute; and that therefore no right of pre-emption had accrued to the plaintiffs, and their suit was consequently not maintainable. The Court of first instance allowed this defence and dismissed the suit. On appeal by the plaintiffs the lower appellate Court affirmed the decision of the Court of first instance, holding that the foreclosure proceedings were invalid, not only because notice of foreclosure had not been duly served on the conditional vendor, but because such notice had issued bearing the seal of the District Judge only and not his signature. The plaintiffs appealed to the High Court.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

TYRRELL, J.—Without expressing an opinion on the lower appellate Court's finding that the service of notice in the foreclosure proceedings on Jeo Lal Singh, the appellant's vendor, was insufficient, we must affirm that Court's finding and decree on the ground that the notice issued by the District Court under Regulation XVII of 1806 was informal and bad, as it did not bear the signature of the Judge, whose seal alone was affixed to the document. We must therefore hold that the foreclosure proceedings were invalid *ab initio*, and affirming the decrees of the Courts below, we dismiss this appeal with costs.

Appeal dismissed.

1882
February 4.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

PANCHAM (DEFENDANT) *v.* JHINGURI AND ANOTHER (PLAINTIFFS).*

Review of judgment—To whom application may be made—Meaning of "made"—Act X of 1877 (*Civil Procedure Code*), *ss.* 623, 624.

The term "made" in s. 624 of the Civil Procedure Code does not mean "presented," but means and includes the hearing and determination of the application for review of judgment.

Held, therefore, where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in s. 623 of the Civil Procedure Code, or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, that his successor was not competent to entertain it.

THIS was an appeal by the defendant in a suit from an order admitting a review of judgment on the ground that the admission was in contravention of the provisions of s. 624 of the Civil Procedure Code. The facts of the case are fully stated in the judgment of Straight, J.

Mr. *Simeon*, for the appellant

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

The Court (STRAIGHT, J. and BRODHURST, J.,) delivered the following judgments:—

STRAIGHT, J.—The respondents, Jhinguri and Hanuman, having brought a suit in the Munsif's Court to recover possession of certain land and a well, their claim was dismissed in its entirety on the 17th June, 1880. They thereupon appealed to the Judge of Allahabad, and he on the 25th September, 1880, allowed the appeal in respect of the land, but confirmed the decision of the Munsif in regard to the well. On the 4th January, 1881, the respondents Jhinguri and Hanuman made an application to Mr. Tyrrell the then Judge of Allahabad, who had determined their appeal, for a review of his judgment of the 25th September, 1880, in so far as it rejected their claim to the well, on the ground that, as he had decreed them the land in which the well was situate, it was obviously an error not to give them the well. On the 10th

* First Appeal, No. 142 of 1881, from an order of R. D. Alexander, Esq., Officiating Judge of Allahabad, dated the 6th September, 1881.

January, 1881, Mr. Tyrrell passed an order directing "issue of notice to the other side," and on the 21st the matter came on for hearing before him. Meanwhile, however, the defendant, Pancham Lal, on the 13th January, had filed a special appeal to this Court, and his pleader on the 21st January, when the application for review was to be heard, requested that it should stand over until the decision of the High Court had been given. To this suggestion Mr. Tyrrell acceded, and an order was made accordingly. Subsequently, Mr. Tyrrell was transferred to the Bench of this Court, and Mr. Alexander took the position of Officiating District Judge in his place. On the 24th June, 1881, the special appeal of Pancham, defendant, was dismissed by the High Court, and the records having been returned to the District Court, the Officiating Judge on the 29th August, 1881, proceeded to deal with the application for review filed by Jhinguri and Hanuman on the 4th January, 1881. Two objections were taken by the defendant, Pancham, to the proceedings, first, that he having appealed to the High Court against the decision of the Judge of Allahabad, the last paragraph of s. 623 of the Procedure Code was applicable, and that Jhinguri and Hanuman being respondents to such appeal should have filed objections under s. 561, instead of applying for review of judgment; second, that by s. 624 of the Procedure Code, the grounds for the review asked being other than the "discovery of new and important evidence, or clerical error apparent on the face of the record," Mr. Alexander was incompetent to entertain the application for review, he not being the Judge who had delivered the original judgment. Both these objections were overruled, and the application for review was granted. From this order Pancham now appeals to this Court, and the only plea taken in the memorandum is that the Officiating Judge acted in contravention of s. 624 of the Procedure Code and had no jurisdiction to grant the review.

The language of the section upon which the appellant relies is no doubt open to the construction his pleader places on it, and his contention is plausible enough. Reading ss. 623 and 624 together, it would appear that, while an application for review of judgment on the ground of new or important evidence, or mistake or clerical error apparent on the face of the record, may be preferred "to the

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Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred," one which is based on "other sufficient reasons" must be made to the Judge who delivered the original judgment, the accuracy of which is impugned. It is obvious that if this latter provision is followed out strictly, not only must grave inconvenience ensue, but with the frequent changes and transfers that take place in the judicial establishment of this country, many litigants under certain circumstances would be virtually debarred from applying for a review at all. Thus if a Judge died or retired, or went on leave, or was transferred to another Court or district, before the ninety days limitation governing these applications had expired, a party seeking review for other sufficient reasons would find himself without remedy, unless it should so happen that his opponent had appealed, in which case he might prefer objections under s. 561, or as a last resource might himself prefer an appeal. But while I feel all the inconvenience and to some extent hardship that must arise from the adoption of the contention urged for the appellant, it seems to me impossible to get over the plain language of the law. The object of review is to "have a reconsideration of the same subject by the same Judge as contradistinguished to an appeal,"—*Maharajah Moheshur Singh* v. *The Bengal Government* (1). Look at the terms of ss. 623 and 624 which way I may, I can come to no other conclusion than that, while applications for review of judgment, when based upon the ground of discovery of new and important evidence, or on account of some mistake or error apparent on the face of the record, may be made to any Judge of the Court which passed the decree or made the order, as being matters not impeaching the essence of the original judgment, or the correctness of the decision, either in law or fact, of the Judge that passed it upon the material before him, those in which "other sufficient reasons" are alleged, attacking the accuracy of his statement of the facts, or otherwise assailing the judgment itself on points admissible in review, must be preferred to the identical Judge who delivered the judgment. I do not concur in the view of the Officiating Judge in this case that the respondents are saved from the operation of s. 624 because they "made their application" to Mr. Tyrrel

(1) 7 Moo. I. A. 283; at p. 304.

on the 4th January, 1881. It appears to me that the word "made" must be construed to include a hearing and determination of the application for review, and to adopt any other interpretation would be to treat the provision as an absurd and useless one. Such being the views I entertain, I have no alternative but to hold that the Officiating Judge acted without jurisdiction in admitting the respondent's application for review, and that this appeal must be decreed with costs.

BRODHURST, J.—I am of opinion that the appellant's plea is valid. Under the provisions of s. 624 of Act X of 1877, the Officiating Judge, Mr. Alexander, was not, I think, competent in the present case to grant the application for review of the judgment of his predecessor Mr. Tyrrell. He could only entertain an application for review of Mr. Tyrrell's judgment on the ground of the discovery of new and important evidence, as alluded to in the preceding section, or on the ground of some clerical error apparent on the face of the decree. Reading ss. 623 and 624 of the Code together, it is I consider palpable that Mr. Alexander was precluded from referring to the record to see if his predecessor had through an oversight or otherwise committed any mistake, for the only mistake or error Mr. Alexander was, under the provisions of s. 624, empowered to notice was that mentioned above, *viz.*, a clerical error apparent on the face of the decree. I therefore concur with my colleague Mr. Justice Straight in decreeing the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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February 7.

SHEO NARAIN (PLAINTIFF) *v.* JAI GOBIND AND OTHERS (DEFENDANTS).*

Usufructuary mortgage—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use.

An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting-off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and

* Second Appeal, No. 738 of 1881, from a decree of M. S. Howell, Esq., Judge of Jaunpur, dated the 12th March, 1881, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Jaunpur, dated the 13th December, 1879.

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interest, asking for enforcement of lien. The instrument of mortgage did not contain an hypothecation of the property. *Held* that although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that, as regards the money-claim, the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract, or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits (1).

THE plaintiff in this suit sued for Rs. 1,769, claiming the same as the principal and interest due on an instrument of usufructuary mortgage, dated the 3rd February, 1874, and asking for enforcement of lien. The instrument on which the suit was founded provided that the mortgagee should hold possession of the mortgaged land, setting-off profits against interest, until the mortgagors should redeem the land by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The plaintiff's cause of action was the failure of the mortgagors to deliver possession of the land as agreed. The Court of first instance gave the plaintiff a decree, directing, *inter alia*, the sale of the property. The lower appellate Court dismissed the suit on the ground that the instrument of mortgage did not contain an hypothecation of the land, and consequently the suit was not maintainable. In second appeal by the plaintiff it was contended on his behalf that, in consequence of the breach by the defendants of their contract to deliver possession, he was entitled to a money-decree against them personally.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Babu *Barodha Prasad Ghose* and Lala *Jokhu Lal*, for the respondents.

The judgment of the Court (STRAIGHT, J. and BRODHURST, J.) was delivered by

STRAIGHT, J.—We concur in the view of the Judge that the usufructuary mortgage executed by the defendants-respondents in favour of the plaintiff-appellant does not contain any hypothecation of the land. The claim of the appellant, therefore, in so far as it sought enforcement of lien, was unsustainable and wholly failed.

(1) See also *Mahesh Singh* v. *Chauharja Singh*, ante p. 245.

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But as regards his money claim, assuming that the consideration was paid as alleged by him, we do not think it equitable or proper that he should be relegated to a fresh suit. The whole of the circumstances on the strength of which the appellant founds his cause of action are fully disclosed in the plaint, and if supported by evidence go to establish the justice of his demand, whether we regard it in the light of a suit for compensation in damages for breach of the contract, or for money had and received for the plaintiff's use, or for money lent. The case must be remanded to the Judge, under s. 562 of the Procedure Code, in order that he may determine it upon the merits. The Judge will of course in hearing the appeal not consider the case in respect of those defendants who did not question the decision of the first Court by appealing. Costs of this appeal will be costs in the cause.

Cause remanded.

CIVIL JURISDICTION.

1882 *February* 8.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Oldfield.

BHAGIRATH (PLAINTIFF) *v.* RAM GHULAM (DEFENDANT).*

Arbitration—Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence—Judgment in accordance with award—Validity of award—Appeal—Act X of 1877 *(Civil Procedure Code), ss.* 520, 521, 522—*Act X of* 1873 *(Oaths Act).*

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award.

Held by STRAIGHT, J., that such decree, being in accordance with the award, was not appealable.

Held by STUART, C. J., that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable.

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* Application, No. 179 of 1881, for revision under s. 622 of Act X of 1877 of a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 25th July, 1881, reversing a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 14th June, 1881.

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Held by OLDFIELD, J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award, within the meaning of the Civil Procedure Code, the decree therefore was appealable.

Per STUART, C. J., that the procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.

THE plaintiff in this suit sued the defendant for Rs. 133, being the principal sum and interest due on a bond. The parties to the suit, being desirous that the case might be referred to the arbitration of one Madan Gopal, joined in applying to the Court of first instance for an order of reference. In this application they agreed to accept and abide by the decision of the arbitrator. The Court referred the case to the decision of the arbitrator. The plaintiff offered before the arbitrator to be bound by what the defendant might state after having been sworn on "Mahadeo." The arbitrator thereupon sent the parties, with a muharrir and a chaprasi, to a temple, and there the defendant, placing his hand on "Mahadeo," swore that he did not owe the plaintiff anything. Then he was brought back before the arbitrator, and made the same statement before him. The arbitrator thereupon decided that the plaintiff's claim should be dismissed. The plaintiff objected to the award on the ground that the procedure of the arbitrator, in swearing the defendant on "Mahadeo," and basing his award on the defendant's evidence so given, was improper, and his award was bad. The Court of first instance disallowed this objection, and gave judgment in accordance with the award, dismissing the plaintiff's suit. The plaintiff appealed, and the lower appellate Court held that the award was void, as based on evidence not legally binding. Its reasons for so holding were as follows:—"There are, however, other points in the case. The oath was not administered by the arbitrator. He sent a muharrir and chaprasi with the defendant to "Mahadeo." Under s. 10 of the Oaths Act, presuming the arbitrator could administer the oath on "Mahadeo," he could issue a commission to administer the oath and record the evidence of the person sworn. It may be said that the muharrir formed a commission but he did not record the evidence of the defendant. It seems to the Court that it was the intention of the plaintiff that the defendant should give his evidence with

his hand on "Mahadeo;" in fact that as a person gives evidence holding Ganges water in his hand, so should the defendant swear and depose with his hand on "Mahadeo." If this was the intention of the plaintiff, then the statement of the defendant was not recorded in a manner which would be binding on him."

The defendant applied to the High Court to set aside the decree of the lower appellate Court on the ground that it had exercised a jurisdiction not vested in it by law, in hearing an appeal from the decree of the Court of first instance, which had given judgment in accordance with the award; and that the lower appellate Court had acted erroneously in setting aside the award, merely because the procedure of the arbitrator had been irregular. The application came for hearing before STRAIGHT, J., and OLDFIELD, J.

Babu *Jogindro Nath Chaudhri*, for the plaintiff.

Mr. *Niblett*, for the defendant.

The learned Judges differed in opinion on the point whether the decree of the Court of first instance was appealable, delivering the following judgments:—

STRAIGHT, J.—I am of opinion that the first objection taken in this petition for review is a good one, and that no appeal lay from the decree of the Munsif passed upon the basis of the award to the Judge. It is admitted on both sides that such decree is neither in excess of, nor out of accordance with, the award, and such being the case I hold that the prohibition contained in the last paragraph to s. 522 of the Procedure Code is a positive and absolute bar. I entirely dissent from the view that it is competent for a Court of appeal to go behind an award for the purpose of ascertaining whether it has been formally and properly made. The only tribunal to look into or interfere with it is the Court that has directed the reference to arbitration, and then only within the limits specifically provided by ss. 518-520 and 521 of the Procedure Code. If the contention to the contrary were correct, the prohibition of s. 522 would became virtually useless, for an appeal might be preferred in almost every arbitration case in order to open up the proceedings of the arbitrator. Save in so far as its orders "superseding an arbitrator" or "modifying or correcting an award" or

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its decree on an award "exceeds or is not in accordance therewith," there is no appeal from the Court referring a case to arbitration. The policy and propriety of this legislation appear to me indisputable, and nothing to my mind could be more mischievous than to interfere with the finality which the law obviously intended should be given to proceedings in arbitration. I would allow this application with costs, and reversing the decision of the Judge restore that of the Court of first instance.

OLDFIELD, J.—This case has come before us on a petition for revision under s. 622, Civil Procedure Code, on the ground that the Judge had no jurisdiction to entertain an appeal from the decree, which it is alleged was passed in accordance with an award of an arbitrator made under the provisions of the Code of Civil Procedure.

On the question how far an appeal is prohibited, I would observe that it is only when the decree follows a judgment in accordance with an award that an appeal does not lie under s. 522, Civil Procedure Code. *Primâ facie* there is a right of appeal from every original decree, but this right has been taken away by s. 522 in case of a decree following a judgment in accordance with an award. Before, however, a Court of appeal is in a position to apply this provision in s. 522, it is necessary that it satisfy itself that there is an award which can rightly be so considered, that the thing called an award is an award which the Code of Procedure contemplates, and an appellate Court must so far look behind the decree. If there is nothing which is properly an award, there can be no final decree such as s. 522 refers to. Such I believe has been the view of the law taken by the Courts, and I may refer to *Sunt Lall* v. *Bubboojee* (1) and *Boonjad Mathoor* v. *Nathoo Shahoo* (2).

In the case before us, I find from the Judge's judgment that the matter in dispute, *viz.*, a claim for Rs. 34-10-0 on a bond was referred to arbitration at the instance of the parties, and while before the arbitrator the "plaintiff agreed to be bound by what the defendant might swear having placed his hand on Mahadeo; the defendant was sent with a muharrir and chaprasi to the temple of

(1) N.-W. P. S. D. A. Rep., 1863, vol. ii., p. 42.

(2) I. L. R. 3 Calc. 375.

Mahadeo and then came back when his evidence was recorded, and on his statement as thus recorded the award was given."

The procedure thus adopted is that allowed by the Indian Oaths Acts, but it is by that Act confined to Courts of Justice, and not extended to arbitrators, and necessarily so, because it is inconsistent with the position of an arbitrator, and the material objection to the procedure adopted in this case is that it is inconsistent with a reference to arbitration.

A reference to arbitration contemplates that the arbitrator shall exercise his own judgment on the evidence, but when the parties agree to be bound by the oath of a particular person, the decision is taken out of the arbitrator's hands, and in fact he ceases to act as arbitrator, the arbitration is superseded, and the decision made is not that of an arbitrator, so as to be an award within the meaning of the Code of Procedure. This is the serious and I think fatal objection; there has been no award in this case, and in consequence no final decree under s. 522.

The appeal was therefore properly entertained. The Judge, besides holding the procedure illegal, has found that the reference to oath was not made in the manner contemplated so as to be binding, and he has remanded the case for fresh disposal, and I would not interfere.

In consequence of the learned Judges who first heard the application differing in opinion, the case was referred to the learned Chief Justice, who delivered the following judgment :—

STUART, C. J.—In this case the arbitration was directed by order of the Court in which the suit was instituted, and an award has been made and there has been a decree thereon. The record shows that there were no objections to the award on the grounds stated in ss. 520 and 521. It appears to have been made in accordance with the arbitrator's view of the evidence, which consisted of the deposition or statement on oath of the defendant given on the application of the plaintiff himself. As to the procedure in other respects relating to the conduct of such an arbitration under Chapter XXXVII. of Act X. of 1877, we may assume that it was followed, and indeed there is nothing to show it was not. That being so, and the procedure directed by s. 522

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having been also observed, it is clear that there is no appeal from the Munsif's order made according to the award. I therefore concur in the opinion of Mr. Justice Straight and in the order he proposes.

This is sufficient for the disposal of the case, but as other matters have been discussed in connection with the arbitration proceedings, I think it right to state that in my opinion the arbitrator, in disposing of the case as he did on the oath of the defendant, was fully justified in the course he adopted. It has been objected that he was not warranted by the Oaths Act (X. of 1873) in accepting the defendant's deposition, although it is not denied that a "Court" could act upon such evidence. That Act, however, need not be imported into the case; it does not take away from arbitrators any powers as to taking evidence or otherwise which they had previously possessed; but even if it applied to and governed this case, what took place was quite consistent with a reasonable application of the provisions of that Act. An arbitrator is entitled to conduct the proceedings in the arbitration and to determine questions of evidence according to his own views of the exigencies of the case before him, and if one of the parties to the arbitration records by written application or otherwise his willingness to rest his case upon his opponent's deposition, the arbitrator can make his award accordingly. In the present case it was the plaintiff himself who applied by petition to the Court that the case might be determined, or in other words that an award might be made, in accordance with the evidence of his opponent, and this course was adopted. The arbitrator was clearly entitled to adopt such procedure and to make his award in accordance with the defendant's oath. His powers in this respect appear to me to fall within the principle recognised in the English case of *Hagger* v. *Baker* (1), referred to on page 647 of Mr. Russell's learned and well known work on the powers and duties of arbitrators, 4th edition, 1870, where it was held that an award would not be avoided even if the arbitrator were erroneously to reject admissible or receive inadmissible evidence. Indeed to hold otherwise would be to open the door to all the mischiefs and inconveniences pointed out in the opinion of Mr. Justice Straight.

Application allowed.

(1) 14 M. and W. 9.

APPELLATE CIVIL

1882
February 10.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr Justice Oldfield.

PARAM AND OTHERS (PLAINTIFFS) *v.* ACHAL (DEFENDANT).*

Co-sharers, suit by some of several—Error in frame and valuation of suit—Error not affecting jurisdiction or merits—Act X of 1877 (*Civil Procedure Code*), *s.* 578.

The plaintiffs in this suit, alleging that they were co-sharers of a certain village : that certain land situate in such village was the property of the co-sharers : and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned, and valued the suit according to their share. *Held* that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of the case, was not, under s. 578 of the Civil Procedure Code, a ground on which the appellate Court should have reversed the decree of the Court of first instance. *Unnoda Persad Roy* v. *Erskine* (1) distinguished.

THE plaintiffs in this suit, the defendant No. 1 (Achal), and the defendants Nos. 6 to 17 were co-sharers of a certain village. On the 26th August, 1879, the defendants Nos. 2 to 5 sold a plot of land, numbered No. 261, situate in the village, to the defendant No. 1. The plaintiffs, alleging that such land was the property of the co-sharers of the village, claimed in this suit possession of their share of such land, and the cancellation of the deed of sale in so far as it affected such share. They valued such share at Rs. 100, and instituted the suit in the Munsif's Court. The defendants Nos. 6 to 17 were made defendants because they refused to join with the plaintiffs in bringing the suit. The Munsif gave the plaintiffs a decree for the cancellation of the deed of sale in so as it affected the share claimed, but dismissed the claim for possession of such share. On appeal by the defendant No. 1 the District Judge held that the suit was not maintainable in the form in which it was brought. The District Judge's reasons for so holding were as follows: "The plaintiffs sue to have the deed of sale executed in Achal's (defendant No. 1) favour cancelled on the ground that the land sold was held rent-free in lieu of service, and that the sellers had

* Second Appeal, No. 799 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 2nd June, 1881, reversing a decree of Munshi Manmohan Lal, Munsif of Kanauj, dated the 16th April, 1881.

(1) 12 B. L. R. 370.

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no right of sale: the suit is, however, only to cancel the sale-deed in so far as the plaintiffs' share in No. 261 is concerned; it is not to cancel it altogether: the Court does not think the suit will lie in the form brought: the case of *Unnoda Persad Roy* v. *Erskine* (1) is referred to: the plaintiffs have made the sharers defendants, *i.e.*, those who are not joining them in the suit, but they have sued for possession of their own share only, and for cancelment of the deed of sale in so far as it affects that share: the cause of action was the sale of the whole field; the plaintiffs have sued in respect of part only of the cause of action, namely, that which applied to them: the suit should be framed on the sale of the whole property and valued accordingly, so that the rights of all the parties interested in setting aside the sale might be declared in one suit." The plaintiffs appealed to the High Court, contending that they were competent to sue for the cancellation of the sale-deed to the extent of their interest in the subject-matter of the sale, and were not obliged to sue for the cancellation of the sale-deed in its entirety; and that, as all the co-sharers were parties to the suit, there was no objection to the granting of the relief claimed, and none of the co-sharers could be prejudiced by such relief being granted.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Babu *Sital Prasad Chattarji*, for the respondent.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—It appears that some of the defendants, occupiers of a piece of land in the mauza, have sold it to one of the shareholders of the mauza, and the plaintiffs who are co-shareholders bring this suit against the vendors, the vendee, and all the co-shareholders who have not joined in suing, to set aside the sale in respect of the plaintiffs' share in the land, and for possession of so much of the land as represents their share. The Court of first instance decreed the claim in part, and the Judge has dismissed the suit on the ground that it will not lie in the form in which it has been brought. He observes that the cause of action is the sale of the whole field, and the plaintiffs sue in respect only of a part of the cause of action, namely, that which applied to them, and the suit should be

(1) 12 B. L. R. 370.

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framed on the sale of the whole property and valued accordingly, so that the right of all the parties interested in setting aside the sale might be declared in one suit, and he refers for authority to a Full Bench ruling of the Calcutta Court—*Unnoda Persad Roy* v. *Erskine* (1).

We are of opinion that the case referred to is not in point. In that case the material ground for dismissing the suit was that the plaintiff by the valuation of his suit was limited to the setting aside the sale of his own share, and by framing it in that way he had brought it in a Court in which he could not have brought it if it had been a suit to set aside the sale as to the entire property, and as the suit ought to have been framed and valued on the sale of the whole property, and ought to have been brought in a Court competent to declare the rights of all parties interested in setting aside the sale, the Court dismissed it. The material ground therefore was one affecting the jurisdiction of the Court. But the case before us is not obnoxious to this objection; the Court in which it has been brought is competent to determine the rights of all the parties interested in the sale, and the error in framing the suit or its valuation does not affect the jurisdiction of the Court or the merits of the case, and should not, with reference to s. 578, Civil Procedure Code, be a ground for interfering with the decree of the Court of first instance. We decree the appeal and reverse the decree of the lower appellate Court, and remand the case for disposal on the merits; costs to abide the result.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

1882. *February* 11.

PRAG CHAUBEY (PLAINTIFF) *v.* BHAJAN CHAUDHRI AND OTHERS (DEFENDANTS).*

Mortgage—Conditional sale—Pre-emption—Act XV. of 1877 (*Limitation Act*), *sch.* ii, *No.* 10—*Time from which period begins to run.*

A conditional vendee, who was in possession, applied under Regulation XVII. of 1806 to have the conditional sale made absolute. The year of grace expired in July, 1878. In November, 1878, the conditional vendee sued for possession of the property by virtue of the conditional sale having become absolute. He obtained a decree, in execution of which he obtained, on the 30th April, 1879, formal pos-

* Second Appeal, No. 804 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 8th March, 1881, affirming a decree of Maulvi Munir-ud-din, Munsif of Deoria, dated the 24th September, 1880.

(1) 12 B. L. R, 376.

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session of the property according to law. On the 23rd March, 1880, a suit was brought against him to enforce a right of pre-emption in respect of the property. *Held* that the period of limitation for such suit ran, not from the expiration of the year of grace, but from the 30th April, 1879, the date the conditional vendee obtained possession in execution of his decree.

THE plaintiff in this suit claimed to enforce a right of pre-emption founded upon special contract. In the year 1866 the proprietors of a share of a certain village gave a mortgage of it, by way of conditional sale, to the defendant Bhajan, delivering possession of the share to him in January, 1867. In 1877 the defendant Bhajan applied for foreclosure of the mortgage under Regulation XVII of 1806. The year of grace expired in July, 1878. In November, 1878, the defendant Bhajan instituted a suit against the mortgagors to have the conditional sale declared absolute and for possession of the share. He obtained a decree in this suit in execution of which formal possession of the share was delivered to him according to law on the 30th April, 1879, he executing the usual "*dakhl-nama*" (1). On the 23rd March, 1880, the plaintiff instituted the present suit against him and the mortgagors, claiming the share by right of pre-emption. Both the lower Courts held that the period of limitation provided for the suit by No. 10, sch. ii. of Act XV of 1877, *viz.*, one year, began to run from the date on which the year of grace expired, when the possession of the defendant Bhajan, which before that date had been the possession of a mortgagee, became that of a proprietor, and the suit was therefore barred by limitation. In second appeal by the plaintiff it was contended on his behalf that the period of limitation began to run from the 30th April, 1879, when he obtained possession of the share under his decree.

Babu *Jogindro Nath Chaudhri* and Shaikh *Maula Bakhsh*, for the appellant.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

The Court (OLDFIELD, J., and BRODHURST, J.,) delivered the following judgment:—

OLDFIELD, J.—The question before us is whether limitation should run from the 30th April, 1879, or, as the respondents con-

(1) Acknowledgment of the delivery of possession.

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tend, and as the Courts below have held, from the expiry of the year of grace, when the right and possession of the defendants as mortgagees merged, as it is contended, into a right and possession as vendees.

Art. 10, sch. ii. of the Limitation Act makes limitation to run from the time "when the purchaser takes under the sale sought to be impeached physical possession of the whole of the property sold."

Now if this article can be applied to a case like the one before us, where possession was held of the property by the conditional vendee before the sale became absolute, and if fresh physical possession can be said to be taken under the sale of what was already in the conditional vendee's possession, such physical possession must be held to be *taken under the sale* when the mortgagee or conditional vendee takes steps to assert his possession as vendee under the the sale. In this case the respondents did not do this at the expiration of the year of grace; on the contrary, they considered it was, first, necessary to have a decree making the sale absolute, and it was not until they obtained this decree that they took steps to change the character of their possession. In this view we consider that the limitation will run from the date on which they were put in possession under the sale in execution of their decree. We reverse the decree of the lower appellate Court and remand the case for trial on the merits. Costs to abide the result.

Cause remanded.

APPELLATE CRIMINAL.

1882. *February* 13.

Before Mr Justice Straight.

EMPRESS OF INDIA *v.* ANANT RAM AND OTHERS.

False evidence—Using evidence known to be false—Separate trial—Act XLV of 1860 (*Penal Code*), *ss.* 193, 196.

Where several persons are accused of having given false evidence in the same proceeding, they should be tried separately.

A, *S*, *B*, *D*, and *P* were jointly tried, *A*, in respect of three receipts for the payments of money, produced by him in evidence in a judicial proceeding, on three charges of falsely using as genuine a forged document, and on three charges of using evidence known to be false; *S*, *B*, *D*, and *P* on charges of giving false evidence in the same judicial proceeding as to such payments. The Court

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(STRAIGHT, J.,) being unable to say that the accused persons had not been prejudiced in their defence by having been improperly tried together, set aside the convictions and ordered a fresh trial of each of the accused separately.

THIS was an appeal from a judgment of Mr. R. D. Alexander, Officiating Sessions Judge of Allahabad, dated the 29th July, 1881, convicting Anant Ram of using evidence known to be false, and Sukhdeo, Dharam Das, Bidhata, and Pancham of giving false evidence. It appeared that one Chattarman, Anant Ram's brother, had been sued in a Court of Revenue for arrears of rent for 1286, 1287, and 1288 fasli. This suit was defended for his brother by Anant Ram Anant Ram set up as a defence that the rent had been paid and to support this defence produced receipts for 1286, 1287, and 1288 fasli. These receipts were severally for Rs. 36, Rs. 98-4-0, and Rs. 58 The plaintiff alleged that these receipts were forgeries, as they had originally been receipts for Rs. 30, Rs. 80, and Rs. 18. Sukhdeo gave evidence in the suit as to the payment by him of Rs. 98-4-0 on behalf of Chattarman. Dharam Das gave evidence as to the payment of Rs. 98-4-0 by Sukhdeo and of Rs. 58 by Anant Ram. Pancham gave evidence as to the payment of Rs. 98-4-0 by Sukhdeo, and Bidhata to the payment of Rs. 58 by Anant Ram. Subsequently Anant Ram, Sukhdeo, Dharam Das, Bidhata and Pancham were jointly tried by the Sessions Judge, Anant Ram in the case of each receipt on a charge of falsely using as genuine a forged document, and in the case of each receipt on a charge of using evidence known to be false, and Sukhdeo, Dharam Das, Bidhata, and Pancham on charges of giving false evidence. Anant Ram was convicted of using the receipts knowing them to be false, and the others of giving false evidence.

It was contended on behalf of the appellants that they had been improperly tried together, and that they had been prejudiced in their defences by being so tried.

Mr. *Hill*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STRAIGHT, J.—I have considered this case very anxiously, having been much impressed at the hearing by the able argument of Mr. Hill, counsel for the appellants. My main difficulty in coming

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to a conclusion upon it has been caused by the exceedingly inconvenient course adopted by the Sessions Judge in trying all the accused together. I have already more than once had occasion to point out that, in cases where several persons are charged with giving false evidence, each of them should be separately tried, and it is unfortunate that these rulings were not brought to the attention of the Judge. In the present instance the charges against Anant Ram of wilfully and corruptly using the altered receipts in evidence as true and genuine documents differed materially from those preferred against the other four accused of giving false evidence, and they should have been heard separately in a proceeding against Anant Ram alone. Having regard to all the circumstances of the case, it is impossible for me to say that the appellants were not prejudiced in their defence by the Judge's procedure, which obviously deprived them of the power to call each other as witnesses in their several cases to depose to the truth of the story they had told in the Revenue Court, and which it was alleged was false. Although very reluctant to have the matter re-opened, it does not appear to me that I have any other alternative. I accordingly quash the convictions and sentences of the five appellants, and I direct that they each be separately and severally re-tried before the Judge of Allahabad, Anant Ram for three offences in respect of the three receipts under s. 196 of the Penal Code, and Sukhdeo, Dharam Das, Bidhata and Pancham for the various false statements alleged to have been made by them, under s. 193. As the case is one of some peculiarity and difficulty it is a matter of satisfaction to me to know that it will be re-investigated by the present experienced and careful Judge of Allahabad (1).

Ordered accordingly.

MATRIMONIAL JURISDICTION.

1882 *February* 15.

Before Mr. Justice Straight.

DE BRETTON *v.* DE BRETTON.

Alimony pendente lite—*Decree* nisi *for dissolution of marriage—Application to make decree absolute—Arrears of alimony—Act IV of* 1869 (*Indian Divorce Act*), *ss.* 16, 36.

A husband, who had obtained a decree *nisi* for the dissolution of his marriage with his wife on the ground of her adultery, applied to have such decree made

(1) At the trials subsequently held all the accused were acquitted.

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absolute. At the time this application was made arrears of alimony *pendente lite* were due to the wife. The Court (STRAIGHT, J.) refused to make such decree absolute until such arrears were paid.

IN a suit under Act IV. of 1869, instituted in the High Court by one Charles James De Bretton, for the dissolution of his marriage with his wife, Florence Emma De Bretton, on the ground of her adultery, Straight, J., before whom the suit was tried, made an order on the petitioner for payment to the respondent of Rs. 70 per mensem by way of alimony pending the suit. On the 17th June, 1881, the Court gave the petitioner a decree *nisi* for dissolution of marriage. On the 9th February, 1882, an application was made on behalf of the petitioner to have such decree made absolute. The respondent was called on to show cause why this application should not be granted.

Mr. *Spankie*, for the respondent, contended that the decree *nisi* should not be made absolute until the arrears of alimony due by the petitioner to the respondent were paid. The petitioner, in omitting to pay the alimony in accordance with the order of the Court, is in contempt. *Latham* v. *Latham* (1) is in point.

Mr. *Howard*, for the petitioner.

STRAIGHT, J.—Upon hearing Mr. Spankie for the respondent and Mr. Howard for the petitioner, I decline to make the decree *nisi* granted by me in this case on the 17th June, 1881, absolute for the dissolution of the marriage of the parties, until such time as the sum of Rs. 295, balance of alimony due to the respondent down to the 1st February, 1882, under the order of the Court, has been paid.

FULL BENCH.

1882 *February* 27.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, and Mr. Justice Tyrrell.

SHAM LAL (DEFENDANT) *v.* BANNA (PLAINTIFF).*

Hindu Law—Hindu widow—Maintenance—Charge on her husband's estate—Bonâ fide purchaser for value without notice.

The maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate

*Second Appeal, No. 501 of 1880, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shâhjahânpur, dated the 29th April, 1880, reversing a decree of Maulvi Amirullah, Munsif of Shâhjahânpur, dated the 5th February, 1880.

(1) 30 L. J., P. and M. 163.

which can be enforced against a *bonâ fide* purchaser of such estate for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate, a portion of such estate will be liable to such charge in the hands of a purchaser, even if it be shown that the heirs to such estate have retained enough of it to meet such charge; but such estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu Law and which under that law takes precedence of a claim of maintenance.

THE following question arising in this appeal was referred to the Full Bench by Stuart, C.J., and Straight J., the Divisional Bench before which the appeal came for hearing:—

"Is the maintenance of a Hindu widow such a charge upon joint ancestral immoveable property as to be enforceable, wholly or proportionately, against the entirety or any part of such joint ancestral property, which has passed into the hands of a *bonâ fide* purchaser for value, at public or private sale, without notice of such maintenance."

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellant.

Mr. *Siraj-ud-din* and Pandit *Ajudhia Nath*, for the respondent.

The following judgment was delivered by the Full Bench (STUART, C. J., STRAIGHT, J., OLDFIELD, J., and TYRRELL, J.):—

OLDFIELD, J.—We have very fully and carefully considered all the authorities and arguments laid before us at the hearing of this reference, but in framing our answer and having regard to clearness and brevity we have not thought it necessary to incumber our reply by referring to the various cases quoted *seriatim* and at length.

The question of the right to maintenance of a Hindu widow was discussed by the Full Bench of this Court in the cases of *Ganga Bai* v. *Sita Ram* (1) and *Lalti Kuar* v. *Ganga Bishan* (2), and so far determined that it was held that there is a legal obligation on the part of those who succeed by inheritance to the joint ancestral property to maintain the widow of the deceased co-parceners, an obligation which could be enforced against those who had succeeded to the estate, and which did not rest on the mere ground of relationship to the widow's husband. Those decisions however

(1) I. L. R. 1 All. 170. (2) N.-W. P. H. C. Rep., 1875, p. 263.

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went no further and did not touch the question raised by this reference, whether maintenance is a charge on the property which will attach to it in the hands of a *bonâ fide* purchaser for value without notice.

The Hindu Law is extremely obscure on the nature of the widow's right to maintenance. But little is to be found in the Mitakshara beyond the passages which treat in general terms of the duty of supporting dependent relatives, and the right to maintenance of persons who are excluded from inheritance, who together with their wives are entitled to be supported by reason of such exclusion.

The Smriti Chandrika and Viramitrodaya are somewhat more explicit. They declare the widow's right to be supported by those heirs who succeed to the estate, whose duty in that respect is declared dependent on their taking the property, and the latter recognizes the widow's right to insist on provision being made for her support by allotting her a share of the estate (Smriti Chandrika, ch. IX., s. ii., v. 14; ch. XI., s i., v. 34; Viramitrodaya, ch. III., pt. i., s. 13).

These and similar texts have reference only to the widow's right as against the heir who succeeds to the joint family estate by inheritance, and they do not seem to be intended to limit the full right of ownership in the land of the heir so as to give a real right of property in it to the widow, prior to allotment to her of a share. Indeed, too much stress should not be put on any of the texts which speak of the wife's ownership in her husband's property (Viramitrodaya, ch. III., pt. i, s. 13). The author of Viramitrodaya does not apparently consider there is any real ownership on her part; he says: "Her right is only fictional but not a real one: the wife's right to the husband's property, which to all appearance seems to be the same (as the husband's right) like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed, but is not mutual like that of the brothers; hence it is that there may be separation of brothers, but not of the husband and wife; on this reason is founded the text, namely,—'Partition cannot take place between the husband and wife; therefore it cannot but be admitted that on the extinc-

tion of the husband's right the extinction of the wife's right is necessary.' "

Strange has treated of maintenance as one of the charges on inheritance, but scarcely in the sense of a charge attaching to the land into whosesoever hands it passes, since he places in the same category other claims which admittedly are not charges on the land in that sense.

It has been held that a purchaser of an undivided share of joint family property has a right to have the share partitioned, and takes subject to the right of the widows who at partition can claim a share. This right of some widows to a share on partition is expressly given by law and stands on a different footing, and it would not be safe to infer from this that maintenance generally is of the nature of a charge on the property.

The later decisions of the Court have recognized that, until fixed and charged by decree of Court or contract on particular property, maintenance is not a charge on the estate, to be enforced against a *bonâ fide* purchaser without notice.—*Lakshman Ramchandra* v. *Sarasvatibai* (1): *Lakhsman Ramchandra Joshi* v. *Satyabhamabai* (2): *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (3): *Juggernath Sawunt* v. *Maharanee Odhiranee Narain Koomaree* (4): *Srimati Bhagabati Dasi* v. *Kanailal Mitter* (5). And this appears to us to be the correct view of the law. The right to maintenance is of an indefinite character: the heir who succeeds to the estate may be said to take it with a trust for the widow's support, which will give her a right against him to have the allowance ascertained and fixed and made chargeable on particular property, but till this has been done a charge cannot be said to exist in the sense of a title issuing out of the land itself, and binding every person who comes into the estate, and a *bonâ fide* purchaser for value without notice of the claim will therefore be protected.

The principle of protecting a *bonâ fide* purchaser without notice cannot be objected to as being something peculiar to English Law, as it rests on grounds of public convenience which are of univer-

(1) 12 Bom. H. C. Rep., 69.
(2) I. L. R. 1 Calc., 365.
(3) I. L. R., 2 Bom. 494.
(4) 20 W. R. 126.
(5) 8 B. L. R., 225.

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sal application, and has been recognized by this Court.—See *Heera Lall* v. *Kousillah* (1) and *Goolabee* v. *Ramtahal Rai* (2).

It may be added that, when the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim, but the property will not be liable if the transfer was made to satisfy a claim for which the ancestral property is liable by Hindu Law, and which under that law takes precedence of that of maintenance.

1882 *February* 27.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

RAHCHANDAR BAHADUR (JUDGMENT-DEBTOR) *v.* KAMTA PRASAD (DECREE-HOLDER).*

Execution of decree—Time of sale—Irregularity in proclamation of sale—Act X. of 1877 (*Civil Procedure Code*), *ss.* 274, 289, 290, 311.

Held that the fact of a sale of immoveable property in execution of a decree having taken place before thirty days from the proclamation of sale being made on the property had expired was not a material irregularity in the publication of the sale.

Mohunt Megh Lall Pooree v. *Shib Pershad Madi* (3) dissented from.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The following judgment was delivered by the Court (STRAIGHT, J. and TYRRELL, J.):

STRAIGHT, J.—This is a first appeal from an order refusing to set aside a sale on the ground of irregularity in its publication. The proclamation was fixed up in the Court-house on the 16th April, 1881, and posted at the spot, where the property was attached, on the 23rd of the same month, the sale being

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* First Appeal, No. 133 of 1881, from an order of Pandit Jaggat Narain, Subordinate Judge of Cawnpore, dated the 28th July, 1881.

(1) N.-W. P. H. C. Rep., 1867, p. 42. (2) N.-W. P. H. C. Rep., 1869, p. 191.
(3) I. L. R. 7 Calc. 34.

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held on the 20th May following. The judgment-debtor objected on the ground that it was allowed to take place before thirty days had expired from the date of the proclamation of sale being notified at the spot, where the property to be sold was situate. The Subordinate Judge disallowed the objection and the judgment-debtor now appeals. The contention of his learned pleader mainly rests upon a decision of a Division Bench of the Calcutta Court in *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi* (1), in which it appears to have been ruled "that the proclamation of sale required by s. 274 of the Civil Procedure Code to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts, which *must precede* the posting of the notices in the Court-house as required by s. 290." We regret we are not prepared to follow this decision. The words of s. 290 that "no sale shall, without the consent of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house" speak for themselves, and as far as our examination of the Code enables us to form an opinion, we find nothing to justify the conclusion, that the failure to post the proclamation of sale on the spot, where the property is attached, *prior* to the fixing up the copy in the Court-house, necessarily renders such latter proceeding ineffectual for the purposes of s. 290. It is true that s. 289 *first* mentions that the proclamation shall be made on the spot where the property is attached, and then goes on to provide for the fixing up the copy in the Court-house, but this seems to us to show that these several acts are to be done as nearly as possible contemporaneously, and not in any particular order. Certainly we do not feel ourselves justified in inferring from the language of this section that, if the sale proclamation has been stuck up on the spot, where the property is attached, *after* the copy has been exhibited in the Court-house, and within a less period than thirty days, that therefore there has necessarily been an irregularity in publishing the sale. The Court ordering the sale has the matter in its own hands, and in fixing the date thereof it must allow *at least thirty days* from the copy of the proclamation being fixed up in its own Court-house. In determining

(1) I. L. R. 7 Calc. 34.

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what the day shall be, it may well consider the distance at which the property to be sold is situate, and the length of time it would reasonably take its officer to get to the spot and put up the required notice there. Thus the Court itself can guard against any injustice being done to the judgment-debtor. Moreover if there is any difficulty on this head, the High Courts, under s. 287, can frame rules for the guidance of the subordinate tribunals in these matters which would effectually prevent any inconvenience or unreasonable delay.

In the case before us more than thirty days elapsed from the copy of the proclamation of sale being fixed up in the Court-house and the date of the sale. There does not therefore appear to us to have been any material irregularity, and affirming the decision of the Subordinate Judge, we dismiss the appeal with costs.

Appeal dismissed.

1880 *July* 22.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

LEKHRAJ SINGH AND OTHERS (DEFENDANTS) *v.* DULHMA KUAR AND OTHERS (PLAINTIFFS).*

Agreement to have case decided on the evidence of third person—Arbitration—Revocation of agreement—Act X of 1873 (*Oaths Act*), *ss.* 8-12—*Act X of* 1877 (*Civil Procedure Code*), *Ch. XXXVII.*

The plaintiffs and some of the defendants in a suit agreed that the matters in difference between them in the suit should be decided in accordance with the statement made on oath by one *J* after he had made a local inquiry into such matters The Court trying the suit accordingly directed that *J* should be examined on a certain day. Before *J* was examined the defendants objected to the case being decided in accordance with *J's* evidence, but the Court disallowed the objection, and having taken *J's* statement on oath decided the case in accordance therewith.

Held by STUART, C. J., that the provisions of ss. 8 to 12 of Act X of 1873 were not applicable to the reference of the case to *J*; that such reference was in the nature of a reference to arbitration under the Code of Civil Procedure; that it would have been valid and binding on the parties had all the defendants joined in it; but that, as all the defendants did not do so, the proceedings were illegal, and they should be set aside and the suit be decided on the merits.

Held by OLDFIELD, J., that the reference of the case to *J* was not made under or governed by the provisions of the Civil Procedure Code relating to arbitration, and therefore the defendants were competent to revoke the agreement; and that, assuming the reference was made under the provisions of the Oaths Act, there was

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* Second Appeal, No. 929 of 1879, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 21st May, 1879, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 22nd March, 1878.

no rule of law prohibiting the revocation of such a reference, and therefore the defendants were competent to revoke the same.

THE plaintiffs in this suit claimed possession of certain land. They claimed as the heirs of one Jagan Nath Singh, alleging that on the 18th June, 1821, Jagan Nath Singh had given a usufructuary mortgage of the land to one Parshadi Singh, represented by certain of the defendants in the suit, his heirs, and the mortgage-debt had been satisfied out of the usufruct. The defendants in the suit were the heirs of Parshadi Singh and certain persons who were tenants of the land in suit. The heirs of the mortgagee, who alone defended the suit, set up as a defence to it, *inter alia*, that the mortgage-debt had not been satisfied. On the 13th March, 1878, the vakils of these defendants and of the plaintiffs preferred a petition to the Court of first instance, in which they stated that they were willing that the suit should be decided in accordance with the statement made on oath by one Jhabbu Singh after he had made a local inquiry. The Court of first instance accordingly made an order that Jhabbu Singh should be examined on the 22nd March, 1878. On that day, before the evidence of Jhabbu Singh was taken, the defendants made an application to the Court objecting to the case being decided in accordance with Jhabbu Singh's evidence, on the ground that he had not made a local inquiry, and they had reason to believe that his evidence would not be impartial. The Court disallowed the objection, and proceeded to examine Jhabbu Singh. He deposed that the plaintiffs were entitled to possession of the land, and the Court accordingly gave the plaintiffs a decree for possession of the same. The defendants appealed, contending that their vakils had no authority to consent to the case being decided on the evidence of Jhabbu Singh. The lower appellate Court held that the vakalat-namas of the vakils in question gave them such authority, and further that the vakils had acted with the consent of the defendants, and affirmed the decree of the first Court.

In second appeal it was contended again on behalf of the defendants that they had not agreed to abide by the statement on oath of Jhabbu Singh, and that, even if they had done so, yet, inasmuch as they had revoked such consent before he was examined, which they were competent to do, they were not bound by his statement.

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LEKHRAJ SINGH v. DULHMA KUAR.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Parsad*), for the respondents.

The Court (STUART, C. J., and OLDFIELD, J.,) delivered the following judgments:

STUART, C. J.—I cannot agree that the Indian Oaths Act X of 1873 has any application to the reference in this case. The sections of that Act which have any bearing on the question are those relating to the power of a Court to tender certain oaths, and these sections are 8 to 12 inclusive. But it is perfectly clear to me that these sections have no application whatever to a party in the position of this reference or to any other person outside the case, and who is neither a "witness" nor a "party," and who is merely called in in the way of arbitration or reference to assist in its disposal by means of an award or other statement of the like nature.

What occurred in this case was the following. After the pleadings had been filed on both sides, issues settled, and evidence taken, certain of the parties, that is, all the plaintiffs and certain of the defendants, preferred an application in the Court of the Subordinate Judge of Jaunpur to have the case referred to what was called the "oath" of one Jhabbu Singh, as referee or arbitrator, stating that they would "abide by whatever decision the said referree will make honestly and in good faith," and upon this reference Jhabbu Singh, the referee, after having had an "oath" administered to him, prepared and filed what is called a "deposition" or otherwise a "statement," but which really was an award or judgment on the matters referred to him. The oath to him was of course superfluous, but it did not make him less a referee or arbitrator, and what he did would have been perfectly valid if the reference to him had been shown to come within the provisions of the Civil Procedure Code on the subject of such references, commencing with s. 506. This section is indeed the only one that could have applied if "all" the parties had been represented in the reference. But no less than twelve of the defendants were not parties to the reference to Jhabbu Singh, and therefore s. 506 can be of no avail

in such case, for it distinctly provides that "all the parties to a suit must join in the reference to arbitration." The result is that what was done in the present case in the way of reference to Jhabbu Singh, including the reference to him, and his award by whatever name it was given, was altogether illegal and ineffectual, and must be set aside, and the case must be sent back to the Subordinate Judge with directions that he resume the suit from the last irregular proceeding in it, and that the Subordinate Judge do dispose of the case on the merits according to law. The respondents must pay the costs of this appeal, which I modify at two gold mohars.

OLDFIELD, J.—The first three pleas fail. It must be accepted that the appellants and respondents agreed by their application to the Court dated 13th March, 1878, to submit the matter in dispute between them to be decided by the statement on oath of Jhabbu Singh after he had gone to the mauza and made inquiries. The application was allowed by the Court, but subsequently and before Jhabbu Singh had been examined on oath the appellants applied to be allowed to revoke their submission on the ground that Jhabbu Singh had made no inquiries, and they had reason to believe that he was partial to the respondents. The Court disallowed their prayer and proceeded to examine the referee, and decided the suit on his statement.

The question now raised is whether such a reference once agreed upon and accepted by the Court may be revoked. The reference does not appear to me to have been made under, or to be governed by, the provisions of the Code of Procedure relating to arbitration; and if it be held to have been made under the Oaths Act, I am aware of no rule under which a submission to reference of this kind may not be revoked before the referee has given his evidence in pursuance of it.

I would decree the appeal and reverse the decrees and remand the suit to the Court of first instance for disposal on the merits. Costs of this appeal to be costs in the cause.

Cause remanded.

1882
February 14.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MORGAN (APPELLANT) *v.* MORGAN (RESPONDENT)

Judicial Commissioner of Oudh—Appellate jurisdiction of High Court in matrimonial suits—Act IV of 1869 (*Divorce Act*), *ss* 3 (2), 55—*Act XIII of* 1879 (*Oudh Civil Courts' Act*) *s.* 27—*Production of additional evidence in Appellate Court.*

A decree dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Divorce Act, 1869, is appealable to the High Court for the North Western Provinces.

At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage, on the ground of her husband's incestuous adultery with her sister *M* and cruelty, the appellant produced certain letters written by the respondent and *M* to each other which showed that a criminal intimacy existed between them. These letters were not written until after the appellant had filed the appeal. *Held* that such letters were admissible and should be admitted, and that, having been brought to the Court's notice by the appellant's counsel, the Court was bound in the interests of justice to require their production in order to enable it to decide the appeal on its real merits.

THIS was an appeal from a decree of Mr. W. C. Capper, Judicial Commissioner of Oudh, dismissing a suit by Sarah Maria Morgan for the dissolution of her marriage with Edward Morgan on the ground of incestuous adultery with her sister Mary Muller and cruelty. While the appeal was pending the appellant filed three letters, one in the handwriting of Edward Morgan and two in that of Mary Muller, which had been sent to her anonymously after the appeal had been filed. These letters were not in existence at the time when the appellant filed her petition for dissolution of marriage or when she preferred the present appeal. They showed that a criminal intercourse existed between the respondent and Mary Muller.

Messrs. *Hill* and *Conlan*, for the appellant.

Messrs. *Thomas* and *Howard*, for the respondent.

Mr. *Thomas* contended, *in limine*, that an appeal did not lie to the High Court from the decree of the Judicial Commissioner of Oudh dismissing a suit for dissolution of marriage under Act IV of 1869.

This objection having been overruled, Mr. *Hill* proposed to prove the letters above mentioned. Mr. *Thomas* contended that the letters should not be admitted in evidence in the stage of appeal.

The Court (STRAIGHT, J., and TYRRELL, J.,) delivered the following judgment :—

STRAIGHT, J.—This is an appeal from a decision of the late Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Indian Divorce Act of 1869, by Sarah Maria Morgan, an European British subject, petitioner, for a dissolution of her marriage with Edward Morgan, respondent, on the ground of his incestuous adultery with Mary Muller, a sister of the petitioner. The Judicial Commissioner dismissed the petition. Upon the case being called on for hearing before us, a preliminary objection was taken by the learned counsel for the respondent to our entertaining it on the ground that we had no jurisdiction to hear the appeal. We, however, were of opinion, first, that, as s. 27 of the Oudh Civil Courts' Act of 1879 declares that, for the purposes of the Indian Divorce Act of 1869, the Judicial Commissioner of Oudh is to be deemed "the Commissioner of the Division," and by the interpretation-clause of the Indian Divorce Act "District Judge" means in the non-regulation provinces a Commissioner of a Division, the Judicial Commissioner of Oudh was for the purposes of the Indian Divorce Act on the same footing and possessed the same powers as a District Judge; secondly, that this Court, being the High Court to whose original criminal jurisdiction the petitioner as a European British subject would be amenable, was the High Court for Oudh in reference to divorce and matrimonial matters under Act IV of 1869; thirdly, that the procedure of Act X of 1877 being specifically adopted and made applicable to proceedings under such last mentioned Act, and s. 55 thereof distinctly declaring a right of appeal, the dismissal of the petitioner's petition by the Judicial Commissioner of Oudh was just as much appealable as if the decision had been passed by one of the District Judges within the North-Western Provinces. To have adopted the contention urged on the part of the respondent would have been to hold that out of all the tribunals in India exercising jurisdiction under the Divorce Act of 1869, the Judi-

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cial Commissioner of Oudh sitting singly, and, as declared by law, in the subordinate character of a District Judge, was alone unappealable. The position was so obviously untenable and absurd that we did not hesitate to overrule the respondent's objection, and accordingly directed that the appeal should proceed. Thereupon Mr. Hill, counsel for the appellant, opened the case for his client, and after stating to us that the main act of adultery relied on in the Court below was alleged to have taken place on the morning of the 27th November, 1880, at Lucknow, on which occasion Mrs. Morgan asserted she had seen her husband leaving the bed of her sister, went on to inform us that since the decision of the Judicial Commissioner, certain letters marked B and C, written by Mrs. Muller, and D by the respondent, had come into the possession of the petitioner, through an anonymous agency, which if admitted by us as evidence could leave no room for doubt as to the existence of a criminal intimacy between these persons. The handwriting was vouched and verified by an affidavit of the appellant. The counsel for the respondent objected that the matter of these letters, even assuming them to be authentic, was entirely new and could not be produced for the first time in an appellate Court. Either it was of a kind that would have justified an application to the Court of the Judicial Commissioner for review of judgment, or afforded material for a new case in respect of which a fresh petition might have been presented. On the other side it was contended that the letters in question were not in existence at the time the decree dismissing the suit was passed, and indeed had only been written subsequent to the filing of the appeal to this Court, therefore no review of judgment could have been applied for under s. 623 of the Civil Procedure Code. For they were not evidence, which, after the exercise of due diligence, could have been within the knowledge of the petitioner, or produced by her in the Judicial Commissioner's Court. Moreover, their contents went directly to the main point to be decided in the appeal, namely, the credibility of the appellant's story. We were of opinion that these letters were admissible and should be admitted, and that having been brought to our knowledge by the appellant's counsel, we were in the interests of justice bound to require their production, in order to enable us to decide the appeal upon its real merits. It seemed at once inequitable and

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inconvenient for us as a primary appellate Court, having power to determine questions of fact as well as law, to refuse to look at evidence almost if not entirely conclusive of the substantial issue before us, as being strongly corroborative of the story told by the appellant, and to relegate her to a fresh suit, which would involve the respondent himself in further expense. Upon our intimating this view, the counsel for the respondent admitted that the letters in question were in the handwriting of his client and Mrs. Muller respectively, and that having regard to their contents, it would be only stultifying himself and wasting the time of the Court to contest the appeal further. We have thought it right to look into the evidence given before the Judicial Commissioner as also to peruse the letters B, C, and D, and having satisfied ourselves that there has been no collusion or connivance between the parties, and that it has been clearly established that the respondent was guilty of incestuous adultery with Mary Muller his sister-in-law, we have no hesitation in allowing the appeal, reversing the decision of the lower Court, and granting the petitioner a decree *nisi* for dissolution of her marriage with the respondent, who will pay all the costs of the proceedings. (The judgment then proceeded to deal with the question of alimony and the custody of the children of the marriage).

APPELLATE CIVIL.

1882
March 7.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PHUL CHAND AND ANOTHER (DEFENDANTS) *v.* MÁN SINGH (PLAINTIFF).*

Joint Hindu Family—Adult Son—Mortgage of family property by father—Decree against father—Right of Son.

The father in a joint undivided Hindu family governed by the law of the Mitakshara mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objec-

* Second Appeal, No. 668 of 1881, from a decree of S. M. Moens, Esq., Judge of Aligarh, dated the 27th May, 1881, modifying a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 31st March, 1881.

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tion having been disallowed, he sued the mortgagee for a declaration that such share was not liable to be sold in execution of the decree, claiming on the ground that he was not bound by the mortgage or the decree, not having joined in the mortgage or been a party to the suit in which the decree was made, and that the debt secured by the mortgage had been incurred by his father for immoral purposes.

Held that the son was not entitled to succeed in such suit merely because, although he was of age, he was not required by the mortgagee to join in the mortgage, and was not made a party to the suit to enforce the mortgage; but that he was in the same position as he would have been had he been a minor at the time the mortgage was made and the decree was passed, and was therefore only entitled to succeed if he showed that the debt incurred by his father was incurred for immoral purposes of his own.

Held further that, inasmuch as the debt in question was incurred for necessary purposes, and as the son was aware of the mortgage and did not protest against it, but on the contrary stood by and benefited thereby, and as he was aware of the suit and did not apply to be made a party thereto, he was asking too late for the relief which he sought. *Ram Narain Lal* v. *Bhawani Prasad* (1) referred to.

On the 23rd October, 1873, Rati Ram and Hardeo Singh, two brothers, having borrowed Rs. 2,000 from one Nathu Ram, gave the latter a bond for that amount, in which as collateral security for its payment they mortgaged their ancestral landed estate, consisting of a two and a half biswas share of a certain village. On the 24th April, 1880, Nathu Ram, having sued Rati Ram and Hardeo Singh on this bond, obtained a decree thereon against them. In execution of this decree he caused the whole property to be attached and advertized for sale. Upon this Mán Singh, a son of Hardeo Singh, who was an adult at the time of the execution of the bond of the 23rd October, 1873, and who had not been made a defendant in the suit brought by Nathu Ram on that bond, objected to the sale of the property, so far as his share thereof under Hindu law was concerned. His objection having been disallowed, he brought the present suit against the heirs of Nathu Ram and against his father for partition of his share of the property, and to have it declared that such share was not liable to sale in execution of the decree of the 24th April, 1880. He alleged that the money borrowed by his father under the bond of the 23rd October, 1873, was borrowed for improper and immoral purposes and without lawful necessity; that his consent was necessary to a transfer of the ancestral property, and such consent had not been obtained;

(1) I. L. R., 3 All. 443.

and that his share could not be sold in execution of a decree passed in a suit to which he had not been a party. The Court of first instance dismissed the suit, finding that Hardeo Singh, the plaintiff's father, had not borrowed the money for which the bond of October, 1873, had been given for improper purposes, but for lawful purposes. On appeal by the plaintiff, the lower appellate Court gave him a decree as claimed on the ground that he was an adult at the time the bond of October, 1873 was executed, and a Hindu father had no power, when his sons were adults, to transfer the family property without their consent; that he had not been a party to the mortgage or in any way consented to it; that he had not been a party to the suit on the bond; and that consequently his share of the family property was not liable to sale in execution of the decree made in that suit. The lower appellate Court observed in its judgment, as regards Rs. 1,000 of the money borrowed under the bond of October, 1873, that this amount had not been shown to have been borrowed for necessary purposes.

In second appeal by the heirs of Nathu Ram, it was contended on their behalf that a mortgage by a Hindu father of ancestral property for necessary purposes was valid, notwithstanding his adult sons had not expressly consented to it. It was admitted at the hearing of the appeal, that virtually the whole of the Rs. 2,000 borrowed under the bond of the 23rd October, 1873, had been borrowed for necessary purposes.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *Dillon* and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The facts out of which this litigation has arisen are fully and, save in one respect, accurately set forth in the judgment of the lower appellate Court. It is now conceded that the whole of the Rs. 2,000, with the exception of a small sum, applied to immediate necessary purposes, which was raised by Hardeo, father of the plaintiff-respondent, and Rati Ram, his uncle, on the 23rd October, 1873, on a mortgage of their 2½ biswa share, was

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appropriated to the satisfaction of decrees obtained against them in respect of antecedent debts incurred either by them or their fathers. The substantial, and indeed the only question, for our consideration is, whether the plaintiff-respondent, as a member of a joint Hindu family, adult at the time of hypothecation of the ancestral property, as also when the suit to enforce it was brought, is bound by the mortgage executed by, and a decree obtained thereon against, his father alone.

So far as we are aware this point has not arisen before, or been made the subject of decision by the Privy Council; indeed it is expressly observed by their Lordships in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) that "it is not so clearly settled whether in order to bind adult co-parceners their express consent is not required." By way of introduction to a discussion of this question, we presume it may be asserted without fear of contradiction, that every son born to the father of a joint Hindu family in possession of ancestral property, by birth acquires a positive, though undefined, share in the joint estate co-extensive with, and as large as that of, all the other members of the joint family, including his father. We also assume that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property, and having had his share determined and allotted him, to hold and enjoy it in severalty. It has been the fashion, to describe the right acquired upon birth by a son born into a joint Hindu family as amounting to no more than an inchoate interest. To us this expression appears a somewhat unfortunate and misleading one, when we remember that it rests with the son, of his own act and by his own demand at any moment he may wish to do so, to give a distinct and individual existence to the specific claim, which by the Hindu law of inheritance, in virtue of his birth, he is declared entitled to assert in respect of the ancestral property. The current of decisions, including a Full Bench ruling of this Court, has definitely declared that where a Hindu father, as managing member of a joint Hindu family, has made alienations of the joint family estate for necessary family purposes, his minor sons are bound by such

(1) I. L. R., 5 Calc. 148; L. R., 6 Ind. Ap. 88.

alienations and by decrees in respect thereof obtained against the father alone, and are not entitled to have their shares released from the operation of such alienations and decrees. The crucial test apparently to be applied in all cases of this description is, whether the debt, to secure which hypothecation of the joint family property was made by the father, was an indispensable one, as an act of duty and pious obligation, or was necessary and essential for the wants and requirements of the joint family. It has therefore, as far as we can understand, now become settled law, that sons who were minors at the time of alienation by, and decree against, their father, are bound in a subsequent suit to avoid such alienation and decree brought against a mortgagee or purchaser to show that the obligation was not incurred by their father for any of the purposes above-mentioned. Such being the position in which the minor sons are placed, and the presumption seemingly being that they are affected by their father's act until they negative its propriety or necessity, the question as to the *status* of a lult sons under like circumstances is not a little perplexing and difficult. At first sight, bearing in mind the conditions under which the joint Hindu family exists, and the subservience to the father as the head and manager, which is one of its most striking characteristics, it is by no means easy to understand why so long as it continues joint the minor and major sons should be upon a different footing. Their interest in the ancestral property is identical and proportionate, their right to have it defined and declared co-equal. If the broad principle of law, which provides that no person shall be bound by a contract in which he did not participate, or by litigation to which he was not made a party, is of any value or has any applicability to such matters, then it is difficult to see why minor sons, who cannot act for themselves, should be placed in an inferior position to adult sons, who are able to protect their own interests. We cannot help remarking that it seems to us not only inconsistent but inequitable to hold that, while the minor sons are to be presumed bound by their father's acts, until they establish to the contrary through the medium of a suit that such acts were not binding upon them, yet in the case of major sons the inference is to be entirely in the other direction. If the mortgagee's failure to take proper precautions is to be held to limit his right of recovery in the one case, it is not unreasonable to

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maintain that a like disability should attach to him in the other. Ordinarily speaking, when a person makes advances upon the security of landed estate he is expected to investigate the title of his mortgagor, and to ascertain the precise nature and extent of the interest upon which he is invited to lend his money. So when one man brings a suit against another, and seeks to make third parties jointly liable, he must include such persons in the array of defendants, if he desires to have them bound by the decree. It may be said these are truisms, but it is impossible not to feel that in all the cases which have been decided in reference to the responsibility of the members of a joint Hindu family for the managing member's acts, they have been to some extent lost sight of and possibly intentionally so. However, until we are set right by higher authority, we are not prepared to apply a different test to the case of adult sons to that which now, by a series of decisions, appears to be the proper one to adopt in the case of minors. In other words, we cannot hold that in the appeal before us the plaintiff-respondent is, "*ex necessitate*," entitled to succeed, because he was not required by the mortgagee to join in the execution of the bond of October, 1873, and was not made a party to the suit thereon in 1880. He came into Court alleging that the loan was contracted by his father for immoral purposes of his own. This assertion the first Court most distinctly found that he had failed to prove, and indeed as we have already remarked at the commencement of this judgment, it is now admitted that the Rs. 2,000 were employed in satisfying antecedent debts, for which the plaintiff-respondent's father and uncle were responsible under the Hindu law. Shortly, the facts of this case therefore are, that the plaintiff-respondent and his father, Hardeo, were living jointly at the time of the execution of the bond of the 23rd October, 1873; that the former was then adult; that the loan obtained from Nathu Ram was a necessary and proper one; that the proceeds of it were devoted to the discharge of antecedent debts, for which Hardeo and his brother Rati Ram were according to Hindu law responsible; and that the decree obtained on the 24th April, 1880, by the mortgagee was against his mortgagors Hardeo and Rati Ram alone, and not against the plaintiff-respondent. Rightly or wrongly, it seems to us, that, having regard to

the fact that the plaintiff-respondent was all along living jointly with, and undivided from, his father, the reasonable presumptions are, that he must have known of the mortgage transaction, that he virtually benefited by it, in that the ancestral property in which he had a share was saved from sale in execution of the decrees of Muhammad Ali Khan and Nathu Ram, and that he must have been well aware of the suit brought in 1880 against his father and uncle. As he in no way protested against the mortgage being made, but on the contrary stood by and derived advantage from it, and for seven years allowed it to continue in force without objection, and, moreover, did not apply to be made a party to the mortgagee's suit, which it was competent for him to have done, we certainly do not think him entitled at this late hour to have the relief granted to him he asks. The mortgage was executed for indispensable and necessary purposes, and according to every principle of Hindu law the respondent should bear his share of the burden. In expressing this opinion, we wish distinctly to guard ourselves by saying that we base it entirely upon the principles of the Hindu law, defining the *status* of the members of a joint and undivided Hindu family, in reference to the father or managing member, and the decisions which have been passed, as to the rights of minor sons in respect of alienations by the father. One of us took part in the Full Bench decision of this Court upon the point adverted to immediately above (1), and had the misfortune to differ with the rest of his brethren. That difference, whether sound or unsound, was founded on the view that the sure test in these matters was by a strict application of the rules of pleading, to broadly recognize and enforce the principle, that no person, whether minor or major, should be bound by a decree in a suit, to which personally or by a representative he was not a party. This opinion, however, did not meet with approval, and though the member of the Court who expressed it has, with the greatest deference of course, seen no reason to alter it, the reiteration of it in the present case, to which the principle so enunciated by him would seem to be directly applicable, would be presumption on his part. Therefore, accepting and adopting the rulings that have been passed in the case of minor sons of a joint and undivided Hindu family, upon a strict application of the doctrine of the Mitakshara, we think that,

(1) *Ram Narain Lal* v. *Bhawani Prasad*, I. L. R., 3 All. 443.

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putting aside ordinary principles of law and procedure, we are bound to hold the adult sons as being in neither better nor worse position than the minors.

Such being the case, we think that the Judge wrongly decided in favour of the plaintiff. This appeal must therefore be allowed with costs, the decree of the Judge set aside, and the plaintiff-respondent's suit dismissed.

Appeal allowed.

1882 *March 7.*

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SHAM LAL AND ANOTHER (DECREE-HOLDERS) *v.* KANAHIA LAL (JUDGMENT-DEBTOR).*

Decree payable by instalments—Execution of whole decree—Payments out of Court—Act XV of 1877 *(Limitation Act), sch. ii, No.* 179 (6)—*Act X of* 1877 *(Civil Procedure Code), s.* 258.

A decree payable by instalments provided that, in default in payment of two instalments, the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of the third and fourth instalments. The judgment-debtor objected that the application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that those instalments had been paid out of court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation, notwithstanding such payments had not been certified. *Fakir Chand Bhose* v. *Madan Mohan Ghose* (1) followed.

THE decree in this case, which was dated the 5th July, 1875, was a decree for the payment of Rs. 450, by instalments of Rs. 40, and provided that, in the event of default in the payment of two instalments, the whole decree should be executed. The 1st, 2nd, 3rd, 4th, and 5th instalments were severally payable on the 9th June, 1876, 27th June, 1877, 16th June, 1878, 6th June, 1879, and 24th June, 1880. On the 2nd February, 1881, the decree-holders applied for execution of the whole decree on the ground that the judgment-debtor had made default in the payment of the 3rd and 4th instalments. The judgment-debtor alleged that he had made default in the payment of the first and second instalments, and the application having been made after the expiration of three years

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* Second Appeal, No. 52 of 1881, from an order of R. M. King, Esq., Judge of Sáharanpur, dated the 28th April, 1881, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 12th March, 1881.

(1) 4 B. L. R. 130.

from the date of such default was barred by limitation. The decree-holders alleged that the first and second instalments had been paid by the judgment-debtor out of court, the first on the 3rd June, 1877, and the second on the 20th June, 1878; and they offered to prove such payments. The lower Courts held that the application was barred by limitation, as it had not been made within three years from the 27th June, 1877, when the judgment-debtor made default in the payment of two instalments; the lower appellate Court holding that, under the provisions of s. 258 of the Civil Procedure Code, the payment of the first and second instalments by the judgment-debtor could not be recognized, even if they had been made, as they had not been certified.

In second appeal by the decree-holders to the High Court it was contended that, in order to show that the application was within time, they were entitled to prove that the first and second instalments had been paid.

Lala *Lalta Prasad* and Maulvi *Obaidul Rahman*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—We are of opinion that it is allowable for the decree-holders to give proof of the fact of payment out of Court of the two first instalments, so as to defeat the judgment-debtor's plea of limitation. This view accords with the Full Bench ruling of the Calcutta Court—*Fakir Chand Bose* v. *Madan Mohan Ghose* (1).

We reverse the order of the lower appellate Court and remand the case for disposal. Costs to follow the result.

Cause remanded.

(1) 4 B. L. R. 130.

1882
March 7.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

IMAMI BEGAM (DEFENDANT) *v.* GOBIND PRASAD (PLAINTIFF).*

Lease by usufructuary mortgagee of mortgaged property to mortgagor—Hypothecation of mortgaged property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court—Act X of 1877 (*Civil Procedure Code*), *s.* 43.

The usufructuary mortgagee of certain land granted a lease of such land to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the transferee of such land in the Civil Court to recover the amount of such decree by the sale of the land, claiming under the hypothecation. *Held*, following *Banda Hasan* v. *Abadi Begam* (1), that such claim was not barred by the provisions of s. 43 of Act X of 1877; that it could only be made through the medium of the Civil Court; and that the shape in which it was presented was perfectly regular.

THE plaintiff in this suit claimed to have it declared that a fifteen biswas share of a certain village was liable to be sold in execution of a Revenue Court decree for arrears of rent, on the ground that such share had been hypothecated as security for the payment of such rent. It appeared that on the 1st February, 1868, one Khalil-ul-lah Khan, the proprietor of the village mentioned above, gave a possessory mortgage of a fifteen biswas share of it to the plaintiff in this suit, Gobind Prasad. The interest payable to Gobind Prasad on the principal amount of the mortgage was fixed at Rs. 900. On the 3rd February, 1868, Gobind Prasad gave Khalil-ul-lah Khan a lease of such share at an annual rent of Rs. 900, the latter hypothecating such share as security for the payment of such rent. On the 26th April, 1870, Afzul-un-nissa, the wife of Khalil-ul-lah Khan, obtained a decree against him for possession of the village. On the 21st May, 1870, Gobind Prasad, who had sued Khalil-ul-lah Khan in the Revenue Court for arrears of rent due on the lease above mentioned, obtained a decree for such arrears. On the 9th August, 1870, Afzul-un-nissa gave Gobind Prasad a mortgage on the remaining five biswas of the village. On the 20th September, 1870, she gave the husband of Imami Begam, a defendant in this suit, a mortgage on the entire village. With the money advanced under this mortgage, she redeemed the mortgages to Gobind Prasad of the 1st

* Second Appeal, No. 903 of 1881, from a decree of W. Young, Esq., Judge of Bareilly, dated the 9th April, 1881, affirming a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 26th November, 1880.

(1) I. L. R., 4 All. 180.

February, 1868, and 9th August, 1870. In May, 1874, she transferred the village to Imami Begam's husband, who transferred it to Imami Begam. In September, 1880, Gobind Prasad instituted the present suit against Imami Begam and the heirs of Khalil-ul-lah Khan in the Court of the Subordinate Judge of Bareilly, to establish his right to bring a fifteen biswas share of the village to sale in execution of the decree for arrears of rent which he had obtained against Khalil-ul-lah Khan in the Revenue Court on the 21st May, 1870. He claimed by virtue of such share having being hypothecated to him as security for the payment of the rent. The Subordinate Judge framed the following issue for trial, amongst others: "Whether after obtaining a simple decree for money from the Revenue Court, this claim for enforcement of hypothecation is valid or not"? Upon this issue the Subordinate Judge observed as follows:—"When a claim for enforcement of hypothecation cannot possibly be made in the Revenue Court, the fact of the plaintiff making no claim for enforcement of lien in the said Court, and of his not making any mention of his lien there, cannot be injurious to him. It has been ruled in several precedents that, after obtaining a simple money-decree from the Revenue Court, the plaintiff can claim enforcement of his lien in the Civil Court, just as a person, after obtaining a decree for rent from the Revenue Court, can legally sue the surety in the Civil Court." The Subordinate Judge in the event gave the plaintiff a decree as claimed, which the District Judge affirmed on appeal by the defendant Imami Begam.

In second appeal to the High Court by the defendant Imami Begam it was contended on her behalf that the suit was not maintainable, as the plaintiff had omitted in the former suit against Khalil-ul-lah Khan to claim enforcement of his lien on the hypothecated share; that a suit would not lie in the Civil Courts to enforce the execution of the decree of a Revenue Court; and that a suit for the enforcement of the plaintiff's lien, based on the decree in question, would not lie.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellants.

Mr. *Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

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The judgment of the Court (STRAIGHT, J., and TYRRELL, J.), was delivered by

STRAIGHT, J.—It appears to us that a decision of a Division Bench of this Court in *Banda Hasan* v. *Abadi Begam* (1) is directly applicable to the present case, and as we no reason to dissent from the view therein expressed, we are of opinion that this appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

1882 *March* 8.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

JOGAL KISHOR AND ANOTHER (DEFENDANTS) *v.* TALE SINGH AND OTHERS (PLAINTIFFS).*

BINDESHRI CHAUBEY AND ANOTHER (PLAINTIFFS) *v.* NANDU (DEFENDANT).†

Suit to have a lease set aside and buildings erected by lessees demolished—Suit for possession of land and demolition of buildings erected thereon—Court-fees—Valuation of suit for the purposes of the Court-Fees' Act, 1870—*Jurisdiction—Declaratory decree—Consequential relief—Act VII of* 1870 (*Court-Fees' Act*), *s.* 7, *art.* iv, *cl.* iv.—*Act VI of* 1871 (*Bengal Civil Courts' Act*), *ss.* 20, 22.

Certain co-sharers of a village sued to have a lease of certain land, the joint undivided property of the co-sharers, which the other co-sharers had granted, set aside, and to have the buildings erected on such land by the lessees demolished, on the ground that such lease had been granted without their consent, without which it could not lawfully be granted. They valued the relief sought at Rs. 100. The value of the buildings of which they sought demolition was Rs. 3,000.

B sued *N* claiming, *inter alia*, possession of certain land, and to have certain buildings erected thereon by the defendant demolished.

Held, with reference to the above mentioned suits, that in estimating their value for the purposes of the Court-Fees' Act, 1870, or of the Bengal Civil Courts' Act, 1871, the value of the buildings which might have to be demolished should not be taken into account.

Held by STRAIGHT, BRODHURST, and TYRRELL, JJ., with reference to the first suit, that it was one for a declaratory decree in which consequential relief was

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* Second Appeal, No 770 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 26th June, 1880, affirming a decree of Maulvi Muhámmad Sayyid Khan, Munsif of Mainpuri, dated the 16th August, 1878.

† Second Appeal, No. 197 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 21st July, 1880, reversing a decree of Maulvi Abdul Razak, Munsif of Deoria, dated the 19th March, 1880.

(1) I. L. R., 4 All. 180.

prayed, and fell under s. 7, art. iv, cl. iv, Court-Fees' Act, 1870, and, such relief being valued at Rs. 100, had been properly instituted in the Munsif's Court.

THESE were two second appeals which came for hearing before Stuart, C. J., and Tyrrell, J. The plaintiffs in the suit out of which second appeal No. 770 of 1880 arose were co-sharers of a certain village. The defendants Nos. 3, 4, 5, 6, 7, and 8 were also co-sharers of the same village. The latter granted the defendants Nos. 1 and 2 a lease of certain land, which was the joint undivided property of the co-sharers of the village, for the purpose of building an indigo factory, such lease being dated the 5th November, 1878. The plaintiffs claimed to have such lease cancelled, and the buildings which had been erected on such land demolished, on the ground that such lease had been granted without their consent, and the defendants Nos. 3-8 were not competent to grant the same without their consent. They valued the relief claimed at Rs. 100, and paid court-fees on their plaint accordingly. The suit was instituted in the Court of the Munsif of Mainpuri. The defendants Nos. 1 and 2 set up as a defence to the suit, *inter alia*, that the relief sought had been improperly valued at Rs. 100, as the buildings sought to be demolished were worth about Rs. 10,000, and that the suit was not cognizable by a Munsif, as the value of such buildings exceeded the pecuniary jurisdiction of a Munsif. The Munsif framed the following issue, among others, for trial: "Is the suit cognizable by this Court." He held on this issue that the suit was cognizable by him, as neither the land in question nor the lease exceeded Rs. 100 in value; and in the event he gave the plaintiffs a decree, which, on appeal by the defendants Nos. 1 and 2, the lower appellate Court affirmed. In second appeal the defendants Nos. 1 and 2 urged in their memorandum of appeal that the Munsif was not competent to entertain the suit, as the buildings sought to be demolished exceeded Rs. 1,000 in value. The Court (STUART, C. J., and TYRRELL, J.), by an order dated the 12th May, 1881, remanded the case to the lower appellate Court for the trial of the issue: "What was the market-value, on the 13th June, 1879 (the date of the institution of the suit), of the buildings the demolition of which was sought by the plaintiffs." The lower appellate Court found that the value of such buildings on that date was Rs. 3,000.

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The plaintiffs in the suit out of which second appeal No. 197 of 1881 arose claimed possession of two pieces of land; to have a wall built on one piece by the defendant, and a house built on the other piece by the defendant, demolished; to establish their right to the flow of the rain water from the roof of their house over land belonging to the defendant; and to have a certain drain closed. They valued the suit at Rs. 49, being Rs. 38, the value of the land in question, Rs. 10 the cost of demolishing the buildings in question, and Re. 1 for the closing of the drain. The suit was instituted in the Court of the Munsif of Deoria, zila Gorakhpur. The defendant set up as a defence to the suit, *inter alia*, that the relief claimed in respect of the buildings erected by him should be valued at their market-value and not at the amount which it would cost to demolish them; and that, as the house of which demolition was sought was worth Rs. 3,000, the suit was not cognizable by the Munsif. The Munsif held that such relief should have been valued at the market-value of such buildings, and, finding that their value was Rs. 225, called on the plaintiffs to pay court-fees accordingly. He also held, with reference to his finding as to the value of such buildings, that the suit was cognizable by him; and in the event gave the plaintiffs a decree. On appeal by the defendant the lower appellate Court held that the suit was not cognizable by the Munsif, as the value of the buildings sought to be demolished exceeded Rs. 1,000. On second appeal the plaintiffs urged in their memorandum of appeal that the Munsif had jurisdiction to entertain the suit.

The same point of law was raised in both these appeals, *viz.*, whether the buildings, of which demolition was sought, were to be taken into account in estimating the value of the suit for the purpose of the Court-Fees' Act. This point the Court (STUART, C. J., and TYRRELL, J.,) referred to the Full Bench, the order of reference being as follows: —

STUART, C. J.—The question that arises for decision in these two cases, Second Appeal No. 770 of 1880, and Second Appeal No. 197 of 1881, is the same, *viz.*, whether the buildings sought to be demolished are to be taken into account in estimating the value in suit for the purpose of determining the court-fees payable on the plaint. This question we refer to the Full Bench of this Court.

No precedent directly bearing on its solution was cited before us, but the case of *Ostoche* v. *Hari Das* (1) was cited as showing, for the purpose of determining the court-fees, the nature and extent of the relief sought in a plaint.

In one of the present cases, Second Appeal No. 770 of 1880, the value of the land, which is the subject of the case, is stated at Rs. 100, and the rent is only Rs. 16, but the buildings which were erected for the purpose of an indigo factory are very valuable, and their demolition would involve a loss to the defendants of about Rs. 10,000. In the other case, Second Appeal No. 197 of 1881, the value of the buildings is not so great, but the same principle of valuation for the purposes of the suit applies to it.

The Court-Fees' Act of 1870, s. 7, sub-section v., contemplates a value for the purposes of a court-fee being put on "houses and gardens" when the "possession" of these is sought, and in the same section and sub-section of the Act and by cl. (*e*) a court-fee is provided for where the subject-matter is "a house or garden according to the market-value of the house or garden." These provisions no doubt relate to suits for possession of houses, a term that would probably be considered to apply to any buildings inhabited or used for any purpose. In the present cases the suit is not for the possession of houses or other buildings, but for their *demolition*, in order that the land may be restored to the plaintiffs without them.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellants,

Pandit *Nand Lal*, for the respondents, in Second Appeal No. 770.

Mr. *Conlan* and Babu *Jogindro Nath Chaudhri*, for the appellants,

Babu *Baroda Prasad Ghose*, for the respondent, in Second Appeal No. 197.

The following judgment was delivered by STUART, C. J., in the two cases:

STUART, C. J.—The question submitted to us by this reference relates only to the demolition of the buildings as claimed

(1) I. L. R., 2 All. 869.

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in the plaint. With the general question of the whole court-fee payable on the suit we have no concern, excepting so far as the relief sought covers, is affected by, or is irrespective of, such demolition. The reference precisely and in terms asks the Full Bench: "Whether the buildings sought to be demolished are to be taken into account in estimating the value in suit for the purpose of determing the court-fees payable on the plaint;" and the reference adds: "This question we refer to the Full Bench of the Court." And in explanation of the difficulty experienced by the Division Bench it is added: "The Court-Fees' Act of 1870, s. 7, sub-section v., contemplates a value for the purpose of a court-fee put on 'houses and gardens' when the 'possession' of these is sought, and in the same section and sub-section of the Act and by cl. (*e*) a court-fee is provided for where the subject-matter is a 'house or garden according to the market-value of the house or garden'. These provisions no doubt relate to suits for the *possession* of houses, a term that would probably be considered to apply to any buildings inhabited or used for any purpose. In the present cases the suit is not for the possession of houses or other buildings, but for their *demolition*, in order that the land may be restored to the plaintiff without them."

Nothing therefore could be more distinct than the one question put by this reference, and the difficulty experienced respecting it by the Division Bench. And that this question was considered material by the Division Bench appears from their order of remand of the 12th November, 1881, made in Second Appeal No. 770 of 1881, and which is in these terms: "The question that arises on the threshold of this action, *and which governs the jurisdiction of the first Court*, has been determined on insufficient grounds. There is no evidence to show satisfactorily what was the market value on the 13th day of June, 1879, of the buildings, the demolition of which was sought by the plaintiff. We remand the case therefore for a distinct finding on valid evidence in respect of this question. On the return to this order, a time to be fixed by the Registrar will be given before the hearing". In the finding returned on this remand the value of the buildings was stated by the Subordinate Judge to be Rs. 3,000 at the time of institution of the suit in

that case, although at the hearing before the Division Bench it was explained, and did not appear to be disputed, that the real value of the building sought to be demolished was about Rs. 10,000. In the other case, Second Appeal No. 197 of 1881, the value of the buildings, as stated in the referring order, is not so great, but the principle on which the valuation for the purpose of the court-fee on the plaint is to be calculated must of course be the same, that is, the court-fee so far as it is affected by the single question of the demolition of the buildings.

Now this question, although it only relates to the matter of a court fee, is a very important one, and it cannot be disposed of by implication or innuendo, for, as stated in the order of remand of the 12th November, 1881, it goes to jurisdiction and to procedure of, it may be, a very perilous nature. Thus if the true value in suit is that stated respectively in the plaints in the two cases before us the Munsif clearly had jurisdiction to entertain them. But not so if the contention of the defendants that the estimated value of the buildings sought to be demolished is well founded. In that case the Court of the Judge or Subordinate Judge would be the proper *forum* for the institution of the suit. Then the consequence of the relief sought being under-valued, or of a miscalculated court-fee, are very serious, for by s. 54 of the Procedure Code it is provided that: "The plaint shall be rejected in the following cases: (*a*) if the relief is under-valued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so; (*b*) if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so." The question put by the reference therefore is in all respects a very serious one.

In the first of the two cases, Second Appeal No. 770 of 1880, the plaint states: "That on the 5th November, 1878, Khalak Singh, Halhal Singh, Lachman Singh, and Dalel Singh, share-holders, and Sugar Singh, the agent of the Raja Sahib, the share-holder of the mauza, executed an invalid lease in perpetuity on a plain paper with respect to eight bighas (by chain measurement) of land bearing Nos.

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1712, 1650, and 1658, in favour of Jogal Kishor and Ram Lal, caste Sadh, for the purpose of building an indigo factory at a rental of Rs. 16"; and the prayer of the plaint is: "That the lease dated Katik Badih 11th, Sambat 1935, corresponding with the 5th November, 1878, in favour of Jogal Kishor and Ram Lal, residents of Farakhabad, be cancelled; that the said lessees be ousted from the land entered in the lease; and that whatever buildings, such as compound and vats, &c., built by them, be demolished: the suit is valued at Rs. 100: the cause of action accrued on the 27th December, 1878: the defendants may be directed to produce the original lease in suit, which is in their possession, under the provisons of s. 70 of Act X of 1877." This certainly is a very loosely worded pleading. It does not ask for possession of land nor even in terms for a declaration of right, although I suppose it must be understood in the latter sense. The only precise claim it makes relates to the houses and their demolition, for it will have been observed it recites the fact of the lease given to the defendants by certain of the share-holders "for the purpose," as the plaint explains, "of building an indigo factory at a rental of Rs. 16," and then in the prayer it asks that the lease be cancelled; that the lessees be ousted from the land; and that whatever buildings, such as compound and vats, &c., built by them (defendants), be demolished." It is thus to my mind perfectly clear that the principal object, if not the sole and only purpose of the suit, was the demolition of the buildings, which the reference states are very valuable, and their demolition would involve a loss to the defendants of about Rs. 10,000. Of course such a demand as this would not be intelligible unless the plaintiffs were understood at least to assert at the same time their own rights. By their plaint, however, as I have pointed out, they make no such assertion, although for the purpose of this reference I am willing to believe that that was what they meant. Their action was directed to these buildings which they wished to demolish, although they knew they had been erected under a lease granted by four of their co-sharers, and were of very considerable value. It may also I think be fairly suggested, although the consideration is scarcely relevant to the present reference, that in erecting these buildings the defendants may be taken to have acted in good faith, and with an honest belief in their rights under their lease, so much so as possibly in the

event of their ouster by the plaintiffs to give them a claim for damages against their lessors, of which if demolished the value of the buildings might be held to be the measure.

In the other case, Second Appeal No. 197 of 1881, the plaint is a very long one, and it alleges a more distinct claim to the land than in the other case, yet this is done in terms in which show that the main object of the suit was to demolish the buildings which had been erected by the defendants. For the principal relief prayed for is:— "To obtain possession as before of the foundation land, 28 cubits long and 2½ cubits broad, on the west, belonging to the plaintiffs' house, by *demolishing* the recently built wall both kacha and pucka, and of 10 cubits long and 10 cubits broad of land on the east of that wall, which appertains to the two storied house built in the yard of their former house, by *demolishing* the house recently built by the defendant."

Such being the nature of these two suits it appears to me to be extremely doubtful, to say the least, whether the right and title and possession of the land are the only matter in regard to which the relief asked for can be looked to. But on the other hand s. 7 of the Court-Fees' Act provides that: "The plaintiff shall state the value of the relief sought," and in any case a plaintiff could not be expected to put any value on buildings which it is the object of his suit to demolish. It is indeed very difficult to find a place for a suit of the kind within the four corners of the Court-Fees' Act of 1870, and perhaps we might, without impropriety, hold that their legal character for the purposes of a proper court-fee to be charged on it is a *casus omissus* in the Act, unless it be considered to fall within No. 17(vi), sch. ii of the Act, relating to "every other suit where it is not possible to estimate at a money-value the subject-matter in the suit, and which is not otherwise provided for by the Act." In these two suits, however, it is not only possible to estimate the value of the buildings sought to be demolished, but such estimate has been ascertained with particular distinctness.

In s. 7, sub-section v., there is a court-fee provided for "suits for the *possession* of land, houses, and gardens, according to the value of the subject-matter," and in (*e*) under the same sub-section there is provision for a court-fee where "the *subject-matter* is a *house*

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or garden," and if this expression "subject-matter" could be detached from the opening words of the same sub-section, it might perhaps be considered to cover a claim of the nature made in these suits, but the words "subject-matter" in this provision must I think be read not irrespective of but *with* the commencing words of the same sub-section, "for the *possession* of land, houses and gardens," and that therefore the "subject-matter" in (*e*) means a suit for the possession of a house as the sole and single subject of it, that is, for its use and enjoyment as property, and not possession of a house for the purpose of its demolition. And of course if that be the true view of the present state of the law as provided by the Court-Fees' Act of 1870, the value of the buildings in these two cases sought to be demolished is not to be taken into account in estimating the court-fees to be charged in the suit.

Whether such is a desirable state of the law, or whether the peculiarity of these suits shows a *casus omissus* in the present Court-Fees' Act is a question for serious consideration, and as the Government of India are contemplating a reform and recasting of the Act, and a Bill has been brought into the Legislative Council for that purpose, the opinions given under the present reference might perhaps with advantage be communicated to the Government of India.

The following judgments were delivered by STRAIGHT, BRODHURST, and TYRRELL, JJ., and by OLDFIELD, J., in Second Appeal No. 770.

STRAIGHT, BRODHURST, and TYRRELL, JJ., concurring.—We are of opinion that this is a suit for a declaratory decree, in which consequential relief is prayed, and that it falls within s. 7, article iv., cl. iv., (*c*), of the Court-Fees' Act. The relief sought appears to have been valued at Rs. 100, and the suit was therefore rightly instituted in the Munsif's Court.

OLDFIELD, J.—This suit is on the part of some joint proprietors against other joint proprietors and lessees holding under them, and the claim is substantially to have a certain lease made by some of the defendants in favour of other defendants declared invalid, and to have it set aside, and to eject the lessees from the land, and to have the buildings erected by them removed.

The suit in my opinion was under s. 7, cl. iv, (*c*), of the Court-Fees' Act, and is a suit to obtain a declaratory decree or order where consequential relief is prayed.

There is no prayer for possession of the land or houses so as to bring it under cl. v., s. 7, by which the amount of the fee payable is to be valued according to the value of the subject-matter; the court fee will therefore be valued according to the amount at which the relief sought is valued in the plaint, subject to the provisions of s. 54 of Act X of 1877; the value of the building will not be taken into consideration in estimating the amount of the court-fee payable.

The following judgments were delivered by STRAIGHT, BRODHURST and TYRRELL, JJ., and by OLDFIELD, J., in Second Appeal No. 197.

TYRRELL, J. (STRAIGHT, and BRODHURST, JJ., concurring).—In this case the plaintiff sued to recover possession (*a*) of a piece of land valued at Rs. 38, market-value, alleging that the defendant setting up a false rival claim to ownership and possession of the land had built on it. The plaintiff also (*b*) asserted his title to an easement of roof water over the defendant's land, value Rs. 10: and (*c*) he claimed an injunction for the removal of some buildings made by the defendant on the land in suit. The first claim (*a*) is for title to and possession of land, and is governed by the Court-Fees' Act, s. 7, sub-section v (*d*), providing that such a suit is to be valued on the market-value of the subject-matter, *i.e.*, the land. The claim (*b*) is for an easement, and is governed by s. 7, iv (*e*), and is ordinarily valued at Rs. 10. The relief (*c*) is an injunction, s. 7, sub-section iv (*d*), and is to be similarly valued. The combined valuation would be Rs. 58.

The "subject-matter in dispute" of ss. 20 and 22 of Act VI of 1871 is the same thing as the "relief sought" of s. 54 of Act X of 1877, with respect to the question of valuation for jurisdiction.

In this suit the "subject-matter in dispute," the "relief sought," is the restoration of the plaintiff's possession over his land which the defendant has taken from him. There is a further sub-relief incidental to the repossession, that is, the removal of the buildings made by the defendant on his pretended title; and also the plaintiff's easement. The plaintiff must pay the *ad valorem* fee of the Court-Fees' Act on the first relief he claims, and the fixed fees of

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the same Act on the others. But he need not pay on the value of the buildings raised by the defendant. This is not a proper factor in the estimate of the plaintiff's reliefs He must pay on the title he asserts, the thing he wants to recover, or the equities he has to vindicate, not on any considerations of what cost or charges or loss his success in his suit may entail on the defendant.

The answer therefore in this as well as in the other referred case should be that the value of the buildings which may have to be demolished is not to be taken into account in estimating the the value of the suit for the purposes of the Court-Fees' Act or of the Bengal Civil Courts' Act VI of 1871.

OLDFIELD, J.—The suit is to obtain possession of a piece of land, to have demolished certain buildings which the defendants have erected, and to have a right of easement decreed.

The first relief sought comes under v (*d*), s 7, Court-Fees' Act, and the court-fee will be computed according to the market-value of the subject-matter, that is the land, irrespectively of the buildings of which possession is not sought, subject to the operation of s. 9 of the Court-Fees' Act.

The second relief sought is in the nature of a mandatory injunction, and the third an easement, coming under (*d*) and (*e*), iv, s. 7, Court-Fees' Act, and the fees will be computed according to the amount at which the reliefs sought are valued in the plaint subject to the provisions of s. 54 of the Code of Civil Procedure. The value of the buildings sought to be removed should not in my opinion be considered in computing the value of the second relief sought.

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March 10.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SIRDAR KUAR AND ANOTHER (PLAINTIFFS) *v.* CHANDRAWATI AND ANOTHER (DEFENDANTS).*

Accounts stated—Bond given for balance—Bond impounded as insufficiently stamped —Suit on accounts stated—Contract, substitution of new.

Where accounts between a creditor and his debtor were stated, and the latter gave the former a bond for the balance found due by him to the creditor, *held*

*Second Appeal, No. 925 of 1881, from a decree of W. Kaye, Esq., Commissioner of Jhansi, dated the 19th May, 1881, affirming a decree of J. MacLean, Esq., Assistant Commissioner of Jhansi, dated the 3rd March, 1881.

that the creditor was precluded from subsequently suing on the accounts stated for the balance which had been found due.

THIS was a suit for Rs. 789-8-6 due on accounts stated. It appeared that accounts between one Ram Chand, represented by the plaintiffs in tl is suit, and the defendants in this suit had been stated in May, 1878, and a sum of Rs. 1,187-13-0 was found to be due by the defendants to Ram Chand. The defendants gave Ram Chand a bond for the amount so found due payable by instalments, in which they hypothecated certain immoveable property as collateral security. This bond was subsequently impounded by the revenue authorities by reason of its being insufficiently stamped. The defendants paid three of the instalments payable thereunder. In January, 1881, the heirs of Ram Chand, abandoning the bond, instituted the present suit against the defendants for the balance of the debt, basing their claim on the accounts stated. Both the lower Courts held that the suit would not lie, as by the execution of the bond the debt due on the accounts stated had come to an end, and a new debt under the bond had been created.

In second appeal by the plaintiffs to the High Court it was contended on their behalf that the amount claimed being due to them by the defendants they were equitably entitled to a decree, the form of the suit notwithstanding.

Munshi *Sukh Ram*, for the appellants.

Babu *Ratan Chand*, for the respondents.

The judgment of the Court (STRAIGHT, J. and BRODHURST, J.) was delivered by

STRAIGHT, J.—Much though we might have wished to be able to hold that the bond entered into between the parties did not preclude the plaintiff-appellant from recovering on his account stated, we find ourselves unable to do so. It is obvious that, when the adjustment of accounts took place and the bond was made, it was intended to consolidate and secure the debt due from the defendant to the appellant, and was the new contract to subsist between the parties in supersession of the former one. We are reluctantly compelled to hold that the lower Courts have rightly decided and that this appeal must be dismissed with costs.

Appeal dismissed.

1882
March 11.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

DHONDHA RAI AND OTHERS (DEFENDANTS) *v.* MEGHU RAI AND OTHERS (PLAINTIFFS).*

Mortgage—Foreclosure—Agreement between mortgagor and mortgagee—Breach by mortgagor—Right of mortgagee to fall back on mortgage-rights.

The mortgagee of certain shares of certain villages applied for foreclosure under Regulation XVII of 1806. While the year of grace was running and shortly before its expiration the mortgagor and the mortgagee came to a compromise in the matter of the mortgage. It was agreed by the mortgagor to transfer by sale to the mortgagee the shares of three of the villages, in lieu of the mortgage-money, and that he should not assert his right under s. 7 of Act XVIII of 1873, as ex-proprietor, to retain the sir-lands appertaining to such shares. The mortgagee agreed to relinquish his claim on the remaining shares arising out of the mortgage and the foreclosure proceedings. It was further agreed that, if the mortgagor asserted the right mentioned above, the mortgagee should be entitled to assert his right in respect of all the shares as a mortgagee who had foreclosed. The mortgagor subsequently, in breach of his agreement, asserted his right under s. 7 of Act XVIII of 1873 to the sir-lands appertaining to the shares transferred to the mortgagee. Thereupon the mortgagee sued the mortgagor for possession of all the shares by virtue of the foreclosure proceedings. *Held*, following *Lall Dhur Rai* v. *Gunput Rai* (1), that, on the failure of the mortgagor to give effect to the compromise transaction, the mortgagee was entitled to fall back on his equities under his mortgage and the foreclosure proceedings take thereunder.

THE plaintiffs in this suit claimed possession of certain shares of certain villages by virtue of mortgages by conditional sale, which had been foreclosed. It appeared that on the 20th August, 1869, and on the 6th December, 1876, the defendants mortgaged by conditional sale the shares in question to the plaintiffs. In 1877 the plaintiffs applied under Regulation XVII of 1806 to have the mortgages foreclosed. On the 12th July, 1878, while the year of grace was running and shortly before its expiration, the plaintiffs and the defendants came to a compromise. By this compromise it was agreed by the defendants that they should transfer to the plaintiffs by sale, in consideration of the money due to them, the shares in three of the villages, and that they should not assert their right under s. 7 of Act XVIII of 1873, as ex-proprietors, to retain the sir-lands appertaining to such shares, and that the plaintiffs should relinquish their claim on the

* First Appeal, No. 11 of 1881, from a decree of J. W. Power, Esq., Judge of Ghâzipur, dated the 2nd September, 1880.

(1) N.-W. P. H. C. Rep 1869, p. 22.

shares of the remaining villages arising out of their mortgages and the foreclosure proceedings. It was further agreed that if the defendants preferred a claim to retain the sir-lands appertaining to the shares thus transferred to the plaintiffs, the compromise should be considered void, and the plaintiffs should be entitled to assert their rights in respect of all the shares as mortgagees who had foreclosed. The defendants subsequently, in breach of this agreement, asserted their right, as ex-proprietors, to retain the sir-lands appertaining to the shares transferred to the plaintiffs, and succeeded in obtaining a recognition of such right in the Revenue Court. Upon this, in February, 1880, the plaintiffs instituted the present suit against the defendants, in which they claimed possession of all the shares mortgaged to them, by virtue of the foreclosure proceedings. The Court of first instance held that, under the circumstances above stated, both parties reverted to the position held by them before the compromise was entered into, and gave the plaintiffs a decree.

The defendants appealed to the High Court, contending, *inter alia*, that the compromise put an end to the foreclosure proceedings, and the breach of their agreement by the defendants could not revive those proceedings.

Messrs. *Conlan* and *Howard*, for the appellants.

Mr. *Colvin*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Mr. *Simeon*, for the respondents.

The judgment of the Court (OLDFIELD, J. and TYRRELL, J.) was delivered by

TYRRELL, J.—The decree of the Court is not open to any of the objections taken in this appeal. The plaintiffs-respondents on the failure of the appellants to give effect to the compromise transaction of the 12th July, 1878, were clearly entitled to fall back on their equities under their conditional deed of sale, and the foreclosure proceedings taken thereunder. This, and no more than this, has been awarded to the respondents by the lower Court's judgment and decree which we approve and affirm. A ruling of this Court in *Lall Dhur Rai* v. *Gunput Rai* (1) has been cited to

(1) N.-W. P. H. C. Rep. 1869, p. 22.

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us by counsel for the respondents. It is quite in point and the principle therein adopted is that which has been applied to the case before us. The appeal is dismissed with costs.

Appeal dismissed.

1882 *March* 17.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

NIGHTINGALE (DEFENDANT) *v.* FAIZ-ULLA AND ANOTHER (PLAINTIFFS).*

Bill of exchange—Mistake—Void agreement—Act IX. of 1872 *(Contract Act), ss.* 13, 20—*Laches.*

On the 3rd March 1881 *N* drew a bill in English at Cawnpore in favour of *F* on a Calcutta firm and gave it to *F's* agent, who did not understand English. *F's* agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F* subsequently sued *N* for the money he had paid for the bill on the ground that his agent had asked *N* for a bill drawn on himself and not one drawn on the Calcutta firm. *N* asserted in defence to the suit that *F's* agent had not asked for a bill drawn on himself but merely for a bill on Calcutta.

Held that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F* could not recover the amount of the bill from *N*, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.

THE plaintiffs in this suit stated in their plaint in effect that on the 3rd March, 1881, at Cawnpore, the defendant Nightingale drew a hundi for Rs. 2,500 on the firm of Rushton Brothers, carrying on business at Calcutta, as agent of that firm, and sold it to Jhamman, their agent, concealing the fact that it was drawn not on himself, but on that firm; that the hundi was written in English, and their agent Jhamman, who was not acquainted with that language, took it believing that it was drawn by the defendant Nightingale on himself; that on the 10th March, 1881, it became known at Cawnpore that the firm of Rushton Brothers had failed and consequently the hundi was not presented for acceptance; that by reason of the failure of the firm of Rushton Brothers the right of action had accrued before the hundi became payable; and that the cause of action arose on the 10th March, 1881. The plaintiffs accordingly claimed to recover Rs. 2,500 from the defendant Nightingale personally, and as a

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* First Appeal, No 90 of 1881. from a decree of W. Barry, Esq., Judge of Cawnpore, dated the 10th August, 1881.

partner in the firm of Rushton Brothers, and from the firm of Rushton Brothers. The defendant Nightingale, who alone defended the suit, set up as a defence to it that he was not a partner in the firm of Rushton Brothers; that he had drawn the hundi as the agent of that firm; that the hundi was translated to the agent of the plaintiffs at the time it was sold to him, and such agent knew the nature of the hundi; and that the money received from such agent on account of the hundi had been applied to the purposes of the firm of Rushton Brothers. The following issue was framed for trial amongst others :—"Did Mr. Nightingale sell the hundi in suit as his own hundi to the agent of the plaintiffs, when in point of fact it was a hundi of Rushton Brothers, without informing such agent of that fact; if so, is Mr. Nightingale personally liable for the value of the hundi?" This was the only issue which was tried as regards the liability of the defendant Nightingale, as it was admitted that he was not a partner in the firm of Rushton Brothers, but the agent of that firm only. The Court of first instance found on the evidence adduced by the parties that the agent of the plaintiffs had asked the defendant Nightingale for a hundi on himself; that the defendant gave him the hundi in question without explaining to him its nature; and that the agent of the plaintiffs received it without knowing its nature and believing that it was drawn by the defendant on himself. Having regard to these findings, the Court of first instance held on the issue set out above that the defendant Nightingale was personally liable for the value of the hundi in question, and accordingly gave the plaintiffs a decree against the defendant Nightingale personally, as well as against the firm of Rushton Brothers.

The defendant Nightingale appealed to the High Court. On his behalf it was contended on the evidence that the agent of the plaintiffs was well aware of the nature of the hundi in question when it was sold to him; and that, assuming that the agent of the plaintiffs did not know its nature, he was guilty of gross negligence in taking it, and in keeping it without ascertaining its nature, until it was too late to obtain any redress, and consequently the plaintiffs could not recover.

Messrs. *Conlan* and *Howard*, for the appellant.

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Mr. *Colvin*, Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the respondents.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.,) was delivered by

OLDFIELD, J.—The defendant, appellant before us, drew a bill as agent of Messrs. Rushton and Co., Cawnpore, on their firm in Calcutta, for Rs. 2,500, in favour of the plaintiffs. The agent of plaintiffs, Jhamman, negotiated the transaction in person with appellant, and the case set up by plaintiffs is that Jhamman asked for a bill of appellant's to be drawn by him as principal, and was given the bill in question which he took in ignorance of its true character; and the firm of Rushton and Co. having failed, plaintiffs sue to recover the money from appellant as well as from the members of Rushton's firm, on apparently two grounds, (i) that he is liable for the amount as one of the partners, (ii) that he is personally liable for giving a bill which was not a bill of the character plaintiffs' agent demanded.

The Judge has held that appellant is not a partner in the firm, and has exculpated him of any intention to defraud plaintiffs' agent or plaintiffs by passing off on him a bill drawn by the firm as one of his own, but he holds he granted the bill "in a careless and inadvertent manner;" that the contract was void *ab initio* by the fact that the kind of bill asked for was not given; and on these grounds he holds appellant personally liable. The decision cannot be maintained. We are not satisfied from a perusal of the evidence that there was any misapprehension between appellant and the plaintiffs' agent as to the kind of bill wanted. Jhamman does not say he told appellant that he wanted his bill only, but merely that he wanted a bill on Calcutta, and appellant and his gomashta distinctly state that the character of the bill drawn was explained to Jhamman, and we consider this evidence reliable, and that Jhamman was not particular as to whether the bill was drawn by Rushton's firm or by appellant, and that the character of the bill was explained to him at the time.

But if we assume that the appellant and Jhamman were under a mutual misapprehension as to the particular kind of bill wanted by Jhamman, and that therefore their minds cannot be said to have

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met as to the matter of sale of the bill, or, in the words of the Contract Act, there was no consent, as they did not agree about the contract in the same sense, the plaintiffs cannot under the circumstances of this case recover the amount of the bill from appellant, because it is clear that Jhamman was guilty of gross negligence in taking the bill and keeping it so long without ascertaining its character and applying for redress, by which circumstances have changed and the position of the parties has been altered, and they cannot be put back into their original position. The bill on the face of it shows that appellant only acted as an agent, and if Jhamman could not read English, he should have had the bill explained; instead of this, on his own showing, he kept it by him for a week, taking no action in the matter, while in the meantime the firm failed, and appellant had expended the money, not on himself personally, but in the business of the firm for which he was agent.

We decree the appeal and modify the decree of the lower Court, by dismissing the suit against appellant Nightingale. Appellant will have his costs in both Courts.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1882 *March* 20.

SALAMAT ALI (JUDGMENT-DEBTOR) *v.* MINAHAN AND OTHERS (DECREE-HOLDERS).*

Insolvent judgment-debtor—Act X. of 1877 (*Civil Procedure Code*), *s.* 351.

A judgment-debtor applied to be declared an insolvent. Certain of the claims against him were claims under decrees. The Court of first instance refused the application, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in s. 351 of the Civil Procedure Code, on the ground that the applicant had contracted the debts for which such decrees had been made dishonestly, and that section gave the Court in such a case a discretionary power to refuse the application.

Held that the Court of first instance had taken an erroneous view of s. 351, and had assumed a wider discretion than the law conferred on it. If a person making an application to be declared an insolvent has not brought himself within clauses (*a*), (*b*), (*c*) or (*d*) of that section, then the Court has no discretion on other grounds to refuse the application. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making false statements in the application are all dealt with

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* First Appeal, No. 3 of 1882, from an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 22nd December, 1881.

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in s. 351, and are intended to confine the category of acts of misconduct that will debar the applicant from obtaining the relief and protection he asks.

THIS was an appeal from an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, refusing an application by the appellant to be declared an insolvent under Chapter XX. of the Civil Procedure Code. Four of the six claims against the appellant mentioned in this application were claims under decrees. These claims all arose in the following manner. In each case the appellant, who acted as a broker, principally in horses, hearing that a person had property for sale, had gone to such person and told him that he knew of a purchaser, who was willing to give so much, and that if the owner would give him the property and allow him so much commission, he would return with the balance. The property had accordingly been given to him, and after a few days he had returned, bringing a sum far less than the price he had stated, and said that the purchaser would not give more. The owner had refused to receive this amount, and had sued him for the value of the property, and obtained a decree against him. Having regard to the manner in which these four claims arose, the Small Cause Court Judge refused to grant the application, holding that the words "may declare" in s. 351 of the Civil Procedure Code gave him a discretionary power to refuse the application in a case where debts had been contracted as they had been in this case, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in that section.

On behalf of the appellant it was contended that the conditions of s. 351 having been satisfied, the Small Cause Court Judge had no option but to declare him an insolvent.

Mr. *Hill*, for the appellant.

One of the respondents (creditors) appeared in person: the others did not appear.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—We are of opinion that this appeal should prevail and that the appellant is entitled to be declared an insolvent as

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prayed by him in his petition of the 26th October, 1881. The Judge has taken an erroneous view of s. 351 of the Procedure Code, and has assumed a wider discretion than the law confers on him. If a person making an application to be declared an insolvent has not brought himself within clauses (*a*), (*b*), (*c*) or (*d*) of s. 351, then the Court has no discretion on other grounds to refuse his petition. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making false statements in the application are all dealt with by s. 351, and are intended to confine the category of acts of misconduct that will debar the applicant from obtaining the relief and protection he asks. As far as we can see there is no real evidence to support the hasty conclusions as to the conduct of the present appellant at which the Judge has arrived, and before coming to them he should have been careful to record the formal evidence of the creditors, who he alleges were dishonestly dealt with by the applicant. As we have, however, already pointed out, this is altogether beside the question, the creditors whether rightly or wrongly had converted the obligations of the appellant to them into a judgment-debt, and under the terms of s. 351 it was no part of the Judge's duty to go behind the decrees to see in what way the debts had been incurred. The appeal is therefore decreed without costs, and we declare the appellant an insolvent, and order his discharge.

Appeal allowed.

FULL BENCH.

1882. *March* 21.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

BIRJ MOHAN SINGH AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF ALLAHABAD AS PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD (DEFENDANT).*

Suit against Municipal Committee—Claim for a declaration of right—Limitation—Act XV of 1873 *(N.-W. P. and Oudh Municipalities Act), s.* 43—*Act XV of* 1877 *(Limitation Act), sch. ii, No.* 120.

A Municipal Committee refused the lessee of certain land permission to establish a market thereon, such lessee having applied for such permission on behalf of

* Appeal under s. 10 of the Letters Patent No. 6 of 1881.

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the owners of such land. Subsequently such Municipal Committee refused the owners of such land such permission on their applying themselves for it. Thereupon the owners of such land sued such Municipal Committee for a declaration of their right to establish such market, and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing.

Held by the Full Bench (reversing the decision of DUTHOIT, J., and affirming that of STUART, C. J.,) that such suit was not barred by limitation under the provisions of s. 43 of Act XV of 1873, because it had not been brought within three months after the date of the alleged cause of action, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under the Act in which compensation was claimed, and not to those in which compensation was not claimed.

Held also by the Full Bench (confirming the decision of STUART, C. J.,) that the refusal of the Municipal Committee to allow the plaintiffs' lessee to establish the market gave them a cause of action.

THIS was an appeal to the Full Bench, under s. 10 of the Letters Patent, from the judgment of Duthoit, J., in second appeal No. 1366 of 1880 decided by him and Stuart, C. J., on the 23rd August, 1881. That case is reported at p. 102 of this volume and the report contains the judgments of the learned Judges who decided it. The facts of the case are stated in those judgments and in the judgment of the Full Bench.

Pandit *Ajudhia Nath*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The Full Bench delivered the following judgments :—

OLDFIELD, J., (STRAIGHT, J., BRODHURST, J., and TYRRELL, J., concurring).—The plaintiffs, as owners of certain lands within the Municipality of Allahabad, brought this suit against the Collector of Allahabad as President of the Municipal Committee in consequence of the refusal of the Committee to allow them to erect buildings and to open a market on their land. It appears that one Mahangu representing plaintiffs made an application to the Committee on the 27th September, 1878, for leave to establish a market and build houses and shops on the land, and his request was refused on the 26th November, 1878, and on the 22nd November of the same year three of the plaintiffs addressed a petition, which they sent by post, to the Committee on the same subject, requesting that they might not be prevented from constructing the market,

buildings, and shops, of which petition no notice was taken. The plaintiffs then brought this suit in which they ask (i) that they be declared competent and entitled to build shops and establish a market on the land owned by them, and (ii) that a perpetual injunction be issued to the defendant as representing the Municipality directing him not to interfere with or obstruct the building of shops and the establishment of a market as claimed. They assert that the denial of the exercise of their proprietary right is calculated to cause them substantial injury, and they allege as their cause of action the order dated the 26th November, 1878, by which their application was rejected. The material part of the defence set up was that the suit is barred by the limitation of three months provided in s. 43 of Act XV of 1873; that the plaintiffs had disclosed no cause of action; and there were other pleas affecting the merits of the claim. The Munsif dismissed the suit on the ground that the Municipality acted within their powers in refusing the permission to establish a market and build shops; and the lower appellate Court (*i.e.*, the Subordinate Judge), without entering into the question of limitation or the merits of the case, affirmed the decree on the ground that the plaintiffs had shown no cause of action against the defendant, inasmuch as the only person who could maintain the suit on the facts disclosed in the plaint was Mahangu. An appeal was preferred by the plaintiffs to this Court, which was heard by the Chief Justice and Mr. Justice Duthoit. The plaintiffs directed their contention against the ground on which the judgment of the lower appellate Court had proceeded, and contended that the rejection of the applications made by some of the plaintiffs and Mahangu afforded a good ground of action; and for the respondents, the plea of limitation was raised. The learned Chief Justice held that the ground on which the lower appellate Court's decision proceeded could not be supported, and that the plea of limitation set up by respondents failed, and he was in favour of reversing the decree of the lower appellate Court, and remanding the case to that Court for disposal on the merits. Mr. Justice Duthoit, on the other hand, held that the suit was barred by the limitation of three months under s. 43 of Act XV of 1873; and his judgment affirming those of the lower Courts prevailing, this appeal has been preferred to the Full Bench of this Court; and it

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raises the two questions which came for disposal before the Chief Justice and Mr. Justice Duthoit.

We have no hesitation in holding with the Chief Justice that s. 43 does not apply to a suit of the nature of the present, which is one for a declaration of a right to establish a market and build shops on the plaintiffs' land, and for an injunction to the defendant not to interfere with or obstruct the plaintiffs, and is not a suit brought for damages for any thing done under the Act.

The law on the subject appears to us to have been correctly stated by the Divisional Bench of this Court in the case to which the Chief Justice has referred.—*Manni Kasaundhan* v. *Crooke* (1).

On the second point we observe that the Subordinate Judge's decision appears to proceed on the ground that the plaint does not disclose any privity between plaintiffs and Mahangu, or any injury to the plaintiffs in consequence of the refusal to grant Mahangu's application.

The plaint does not, however, appear to us to be open to this objection, since the plaintiffs in their plaint refer to the application made by Mahangu as made on their behalf, and refer to the rejection of that application and of their subsequent application as the ground of their action and as calculated to cause them substantial injury, and as a matter of fact it does not appear to be disputed that Mahangu was acting on their authority. The rejection of these two applications, for the last was practically rejected, gave the plaintiffs a right of suit for the relief claimed.

We therefore decree the appeal, and in pursuance of the order of the Chief Justice, the decree of the Subordinate Judge will be reversed, and the case remanded to him for disposal on the merits. Costs will abide the result.

STUART, C. J.—As my colleagues not only concur in my opinion, but in stating their views have gone over the same ground taken in my judgment in the Division Bench, it is unnecessary for me to say more than that I adhere to that judgment in all respects.

Cause remanded.

(1) I. L. R. 2 All. 296.

APPELLATE CIVIL.

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March 22.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

RAJ BAHADUR AND OTHERS (DEFENDANTS) *v.* BISHEN DAYAL (PLAINTIFF)*

Hindu law—Muhammadan law—Convert—Act VI of 1871 (*Bengal Civil Courts Act*), *s.* 24—"*Justice, equity, and good conscience.*"

To entitle a person to have the Hindu or Muhammadan law applied to him under the first paragraph of s. 24 of Act VI of 1871, he must be an orthodox believer in the Hindu or Muhammadan religion. The mere circumstance that he calls himself, or is called by others, a Hindu or Muhammadan, as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871 according to justice, equity, and good conscience.

B, alleging that his family was a joint undivided Hindu family, sued *R* his father for a declaration that certain property was joint ancestral property, and for partition of his share according to the Hindu law of inheritance of such property, *viz.*, one moiety. *R* set up as a defence to the suit that the members of the family were Muhammadans and were therefore not governed by the Hindu law. The evidence in the suit established that the members of the family were neither orthodox Hindus nor Muhammadans. It also established that the Hindu law of inheritance had always been followed in the family.

Held, following the principle enunciated above, that the family not being Hindus or Muhammadans, the rule of decision applicable to the suit was neither Hindu nor Muhammadan law, but justice, equity, and good conscience; that, the Hindu law of inheritance having always been followed in the family, it was justice, equity, and good conscience to apply that law to the suit; and that therefore *B* was entitled to demand partition of half of the family estate.

Abraham v. *Abraham* (1) referred to

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan*, the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), and Maulvi *Mehdi Hasan*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Cawnpore, dated the 4th May, 1880. The plain-

* First Appeal, No. 92 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 4th May, 1880.

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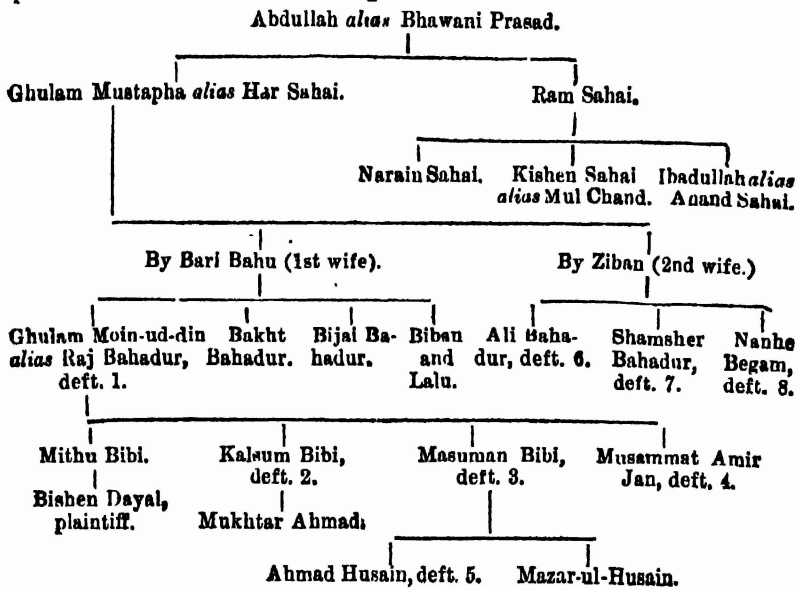
tiff-respondent comes into Court alleging himself to be a member of a joint Hindu family under the Mitakshara with his father Raj Bahadur, defendant No. 1, and as such entitled to one half of the ancestral property. He therefore prays for a declaration that the property, a detail whereof accompanies the plaint, now in possession of his father, or in the hands of third parties as donees, or ostensible but fictitious owners, be declared joint ancestral estate, and that partition being decreed, he receive one moiety thereof with mesne profits to the date of possession. The cause of action is alleged to have arisen on the 17th July, 1876, the day on which demand for partition was made and refused. The defendants, of whom there are several, may be said to range themselves into four groups:—(i) Raj Bahadur, principal defendant; (ii) Kulsum Bibi, Masuman Bibi, and Amir Jan, alleged donees, or ostensible but fictitious owners; (iii) children of Har Sahai, grandfather of plaintiff; (iv) purchasers at various times of portions of the alleged ancestral property.

The following table may perhaps make the position of the various parties in the suit more intelligible:—



Other defendants.

9.	Sheo Dayal	Purchasers from Raj Bahadur, Bakht Bahadur, and Bijai Bahadur.
10.	Sheo Shankar	
11.	Sarbuland	Purchasers from three persons named above to satisfy debt of Cawnpore Bank.
12.	Dhuman Khan	
13.	Mir Khan	
14.	Shankar	

The principal defence is necessarily that put forward by defendant No. 1. In substance it comes to this, that he, his father, Har Sahai, and his grandfather, Bhawani Prasad, were not Hindus, nor members of a joint and undivided Hindu family, but on the contrary were Muhammadans by religion, and as such subject to the Muhammadan law regulating the devolution of property. Defendants Nos. 2, 3 and 4 assert that they are the properly married wives of defendant No. 1 according to Muhammadan law and ordinances; and defendant No. 5 that he is the legitimate son of the said defendants Nos. 1 and 3. Defendants Nos. 6, 7 and 8 virtually reiterate the statement of defendant No. 1, as to the family professing the Muhammadan religion, and they allege that, upon a division of the property according to Muhammadan law, they are entitled to 48 out of 104 sahams. The pleas of the defendants Nos 9, 10, 11, 12 and 13 assert them to be "*bonâ fide*" purchasers for good consideration from defendant No. 1 and his brothers Bakht Bahadur and Bijai Bahadur, who they say sold with the knowledge and consent of the plaintiff. The Subordinate Judge found (i) that it was not established that Har Sahai, father of defendant No. 1, abjured the Hindu religion and professed Muhammadanism, though he no doubt did practise the ceremonies and rites of both religions. "But", as to this he remarks, "neither true Musalmans nor Hindus, according to equity and good conscience they must be held subject to the law of inheritance to which they repeatedly publicly declared themselves amenable, and to which they invariably conformed, and the plaintiff is therefore entitled to one half share." (ii) That defendants Nos. 2, 3, and 4 were not the wives but the concubines of defendant No. 1, and that defendant No. 5 was therefore illegitimate. (iii) That defendants Nos 6, 7 and 8 were not the legitimate children of Har Sahai by Ziban, who was his concubine and not his wife. (iv) That the sales to defendants Nos. 9, 10, 11, 12 and 13, with one exception, namely, that in respect of the debt to the Bank at Cawnpore, being made without the knowledge and concurrence of the plaintiff, were not binding on him, and could not stand. The Subordinate Judge accordingly decreed the plaintiff's claim to a half share of the property with mesne profits, excepting two houses in Fatehpur from the operation of the decree, and holding him liable to contribute one half of the debt due to the Bank at Cawnpore under the decree of the 8th February, 1879.

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From this decision defendants Nos. 1, 2, 3, 4 and 5 appeal. It is unnecessary to set forth at length the various pleas raised in the memorandum of appeal. As compressed and embodied in the able argument of the learned counsel for the appellants, they substantially are represented by the following contentions :—

(i.) The evidence establishes that Bhawani Prasad, the grandfather, Har Sahai, the father, and Raj Bahadur, defendant No. 1, have successively professed and followed the Muhammadan religion ; that during this period of upwards of 50 years the family have been believing in its tenets, and have observed its rites and ceremonies. Under these circumstances the Muhammadan law and no other must govern them in matters of inheritance and such like : (ii) If it is not established that these persons and their families were and are Muhammadans in the strict meaning of the term, still they cannot be regarded as Hindus in the sense implied by s. 24 of Act VI of 1871, and the Hindu law of inheritance is inapplicable to them. Some special principle to regulate the distribution of estate must therefore be found for them, either based upon family custom and usage or conceived in equity, justice and good conscience.

It has been a task of no slight labour and difficulty to wade through the very voluminous depositions of the many witnesses examined on either side, much of the matter contained in which, we may add, is not only irrelevant as evidence but inadmissible. It would have been far more convenient and infinitely less confusing had the Subordinate Judge restrained the proof tendered by the parties within reasonable limits, instead of allowing them to put forward a mass of statements and allegations, the sources of information as to which were not tested, and the greater bulk whereof amounts to nothing better than hearsay. The effect of the Subordinate Judge's procedure has been to incumber the record with a quantity of material that is practically useless. However, despite the unnecessary complication that has thus been introduced into an otherwise comparatively simple case, the main issues between the parties are involved in the decision of the following points :—

(i.) Is the family, of which Bhawani Prasad was the ancestor, and to which plaintiff and his father, defendant No.1, belong, Hindu or Muhammadan in the sense of s. 24 of Act VI of 1871.?

(ii.) If it is not either one or the other, then by what principle or rule is the devolution or division of property belonging to it among its several members to be guided. ?

Before adverting to the evidence bearing upon the first of these two considerations, it will be convenient to examine the terms of s. 24 of Act VI of 1871. Now it seems to us that the language therein used expressly limits the operation and application of the first paragraph of the section to those cases in which the parties are at the time of the litigation orthodox Hindus or Muhammadans in religion. That is to say their "*status*" before the law absolutely depends upon their religious belief, and this in the strict sense of the term. For the very essence of the principles of Hindu and Muhammadan law is drawn from, and may be traced to, religious sources, and it is only where the union of the two exists in its well-understood and natural sense that the "rule of decision" provided by the Act is to be followed. A Hindu or Muhammadan, who becomes a convert to some other faith, is not deprived "*ipso facto*" of his rights to property by inheritance or otherwise. "*Primâ facie*" he loses the benefits of the law of the religion he has abandoned, and acquires a new legal "*status*" according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations. Thus a Hindu adopting the Muhammadan faith, from the moment of his conversion, by that act affects all the property he may acquire subsequently to it, so as to render it subject to the Muhammadan law of inheritance. His apostacy has an immediate and prospective, not a retrospective effect; and his subjection to the new law dates from the moment of his profession of the new religion. It therefore seems to us that in determining whether parties are Hindus or Muhammadans within the meaning of s. 24 of Act VI of 1871, we must apply its terms strictly, and confine their operation to those who may properly be regarded as orthodox believers in the one religion or the other. It is said that while Hindus will not eat or hold intercourse with those of their community who indulge in the practices of other religions, and virtually regard them as excommunicated, yet that they nevertheless account such persons to be properly describable as Hindus. How this may be we are not prepared to vouch, though admitting such to be the case

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it does not carry the matter further. If we are correct in our view that the *status* of a Hindu or Muhammadan under the first paragraph of s. 24, Act of VI of 1871, to have the Hindu or Muhammadan law made the "rule of decision", depends upon his being an orthodox believer in the Hindu or Muhammadan religion, the mere circumstance that he may call himself or be termed by others a Hindu or Muhammadan as the case may be is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871.

Turning then to the evidence tendered on the one side and the other, has the plaintiff, Bishen Dayal, established that he and his father have been and are Hindus in the sense we have indicated, and were they at the time of institution of the suit members of a joint and undivided family; or has the defendant Raj Bahadur succeeded in making out that he is a Muhammadan in the like sense? It seems to us impossible upon a perusal of the depositions of the various witnesses to come to any other conclusion than the one arrived at by the Subordinate Judge, namely, that the parties have failed to prove that they are either "true Musalmans or Hindus." If we were to look no further than to the evidence of Raj Bahadur, the defendant himself, and the replies to the interrogatories of Bakht Bahadur and Bijai Bahadur, there would be sufficient to bear out the view, let alone the statements of Ali Bahadur, Anand Sahai, and Kishen Sahai. To our minds it is established to demonstration that no person indulging in the strange and incongruous practices spoken to by these several witnesses could rightly be described either as an orthodox Hindu or Muhammadan, any more than the Plymouth Brethren could be called members of the Church of England. It may be, and no doubt is, true that Bhawani Prasad, then Har Sahai, and then his brother, Ram Sahai, and after them their descendants, Raj Bahadur, Bishen Dayal, Bakht Bahadur, Bijai Bahadur, Narain Sahai, Kishen Sahai, and Anand Sahai read *nimaz* and the *kalma*, offered sacrifices, observed fasts,

gave "*zakat*," distributed alms and food during Ramzan and Muharram, attached themselves to *pirs*, recognised ceremonies on the anniversaries of the deaths of departed relatives, and generally performed many acts characteristic of a belief in the Muhammadan religion. On the other hand, they, with scarcely an exception, on every occasion it was necessary to do so, described themselves as Sribastab Kayasths, always selected their wives from that caste, performing the ceremonies *barat* and *gauna* according to the Hindu fashion; recognised and kept all Hindu holidays and festivals, distributing food and alms on those occasions; lived and fed for the most part in the manner of Hindus; did not bury their dead nor require circumcision, and refused to recognise the title of the females of the family to any share in the inheritance to property. In face of circumstances like these, it seems to us impossible to hold that persons pursuing such inconsistent and irreconcilable ways, which no follower of either religion could combine in practice without placing himself outside its pale, can be allowed to come into Court and claim the same privileges that the law affords to orthodox Hindus and Muhammadans. In our opinion therefore the first paragraph of s. 24 of Act VI of 1871 is not applicable to the present case, with which we must deal according to "justice, equity, and good conscience." Now it is present to our minds that if we were to regard the plaint by the strict rules of pleading, the plaintiff-respondent having based his claim upon the Hindu law and the allegation that he and his father are members of a joint family, and failing to establish his position, his suit should be dismissed as brought. We do not, however, feel called upon to adopt this extreme course, especially as from the view in which we treat the case, though technically different from the precise form in which it has been presented by the plaintiff-respondent, in substance it is practically the same. Under such circumstances we are not disposed to subject the parties to the great expense and delay that would be caused by requiring a fresh suit to be brought.

How then shall we be best acting according to justice, equity, and good conscience in dealing with the case before us.? In the well known decision of the Privy Council in *Abraham* v. *Abraham* (1)

(1) 9 Moo. I. A 199.

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the following passage may be found at p. 242: "Their Lordships, therefore, are of opinion that upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." Now it will be observed that these remarks are applicable to the case of a Hindu converted to *Christianity*, that is to say, to a form of religion which, strictly speaking, can scarcely be said to carry with it or involve any legal rights or obligations. So that a Hindu who becomes a Christian may, it he thinks fit to do so, still elect to be governed by the Hindu law as regards succession and inheritance. But if he embraces the Musalman faith, and becomes an orthodox Muhammadan, it is otherwise; for his new religion is concerned with, and does directly provide for, the devolution and distribution of estate, and he cannot adopt it in one respect and refuse to be bound by it in the other. In the present case, however, we may regard the position of the parties as virtually identical with that of a Hindu converted to Christianity, whose apostacy does not necessarily involve a change of legal *status*. Applying the remarks of their Lordships of the Privy Council above quoted to the case before us, the solution of it is greatly facilitated, for if a Hindu, who becomes a Christian, may yet adhere to the Hindu law, *a fortiori* it should be administered for those who, occupying a *terram mediam* betwixt Hinduism and Muhammadanism, have nevertheless by sustained and consecutive action for many years evinced their recognition of, and submission to, the principles of that law. In *Abraham* v. *Abraham* (1) their Lordships also remark: "The convert though not bound as to such matters, either by the Hindu law, or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by himself having observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his

(1) 6 Moo. I. A. 199.

property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed." Making use of this test in the matter before us we find that, however much the defendant Raj Bahadur and the rest of the family sprung from Bhawani Prasad may have strayed away from the Hindu religion, the Hindu law of inheritance has always been followed among them. When Bhawani Prasad died, his two sons, Har Sahai and Ram Sahai, succeeded him, and subsequently partitioned the property between them. So at the death of Har Sahai, Raj Bahadur, defendant No. 1, Bakht Bahadur, and Bijai Bahadur, his three sons, took the estate jointly at first, to the exclusion of his two daughters, Biban and Lallu, while the three children of his mistress Ziban, as she was described by the defendant Raj Bahadur in the proceedings before the Sadr Amin of Fatehpur in June, 1866, obtained no share or portion. The three sons of Ram Sahai inherited their father's estate in like manner. Then again in October, 1877, the defendant Raj Ba hadur and his two brothers Bakht Bahadur and Bijai Bahadur effected a partition entirely in accordance with the principles of the Hindu law. Further than this and prior to such partition we find in the *wajib-ul-arz* two entries which show that the three brothers were joint, and at that time recognised the Hindu law of inheritance as governing them. Then we have two distinct offers by the defendant No. 1 to give the plaintiff one half of the property. Looking at all these circumstances and the other facts in the case, we think it is equity, justice, and good conscience to apply to the parties to this suit that law of inheritance, whereof partition is a necessary incident, to which they have uninterruptedly adhered. In this view we approve the decision of the Subordinate Judge in holding that the plaintiff is entitled to demand partition to the extent of half the property.

Having thus disposed of the main contention in the case, it is only necessary very shortly to consider the other pleas urged, the first being that for the appellants Kulsum Bibi, Masuman Bibi, and Amir Jan, and the son of Masuman Bibi, Ahmad Husain. (The judgment then proceeded to decide these pleas).

1882
March 23.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

BANDA ALI (PLAINTIFF) *v.* BANSPAT SINGH (DEFENDANT).*

Contract—Bond—Coercion—Consideration—Act IX of 1872 (Contract Act), ss. 2 (d), 15, 19, 25.

A person, while under arrest in execution of a decree which had been made against him by a Court having no jurisdiction to make it, gave the holder of such decree a bond for the amount of such decree *plus* a small sum paid for him for the stamping and preparation of such bond, in order that he might be released from such arrest. *Held* that such bond was given under duress, and that it was executed without consideration, the small sum paid by the holder of such decree for preparing and stamping the bond not being in any legitimate sense of the phrase "consideration" for such bond, and therefore such bond was void.

ON the 5th January, 1879, the defendant in this suit, the lambardar of a certain mahál, obtained in that capacity in a Court of Revenue an *ex-parte* decree against the plaintiff, a co-sharer of such mahál, for arrears of revenue, costs, and interest. On the 16th November, 1880, the plaintiff was arrested in execution of this decree. On the following day, the 17th, in order to effect his release from custody, he gave the defendant a bond for the amount of the decree. On the 3rd December, 1880, he instituted the present suit against the defendant in the Court of the Munsif of Allahabad to have the decree and the bond cancelled. He claimed on the ground that the decree was made without jurisdiction, and that the bond was invalid, as the consideration for it was the amount of a decree made without jurisdiction, and as it was given under duress. The defendant set up as a defence to the suit that the decree in question was made with jurisdiction and could not be set aside, and that the plaintiff had executed the bond while under lawful arrest, of his own free will, to effect his release. The Munsif framed the following issues for trial: (i) "Was the Revenue Court incompetent to pass the decree in dispute, and if so, is it liable to be set aside by this Court." (ii) "Is the bond illegal?" With reference to these issues the Munsif held that the decree was made without jurisdiction; that, the amount of the decree being the consideration for the bond, the consideration of the bond was therefore illegal, and the bond invalid; and that

* Second Appeal, No. 818 of 1881, from a decree of R. D. Alexander, Esq., Judge of Allahabad, dated the 19th May, 1881, reversing a decree of Babu Pramoda Charan Banarji, Munsif of Allahabad, dated the 11th January, 1881.

the bond had been executed under duress, as it had been executed to obtain the plaintiff's release from arrest in execution of an illegal decree, and it was therefore also invalid on that ground.

On appeal by the defendant the District Judge decided that the decree in question had been made without jurisdiction and was therefore illegal, and that all the subsequent proceedings in execution taken under it were illegal, and that the plaintiff's arrest was therefore illegal. He then proceeded to decide the question whether the plaintiff, being under illegal arrest when he executed the bond, executed it under coercion as defined in s. 15 of Act IX of 1872, and decided this question in the negative. He observed on this question as follows:

"By s. 10 of Act IX of 1872 all agreements are recited to be contracts if they are made by the free consent of the parties competent to contract. By s. 14 of the same Act consent, which is defined in s. 13, is said to be free unless caused by coercion as defined in s. 15, and s. 15 defines coercion to be the committing or threatening to commit any act forbidden by the Indian Penal Code to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. Has therefore the defendant committed, or threatened to commit, any act forbidden by the Penal Code, and did he do so to the prejudice of the plaintiff, and with the intention of causing him to execute this bond? As to the first point, as the defendant procured the arrest of the plaintiff, which arrest was illegal, he appears to me to have committed the act of wrongful confinement made penal by s. 342 of the Indian Penal Code, or perhaps, to be more strict, abetted such wrongful confinement, an act made penal under s. 109 read with s. 342 of the Indian Penal Code, and it is clear that he did this to the prejudice of the plaintiff. But did he do it with the intention of causing him to execute that bond? There is a great distinction between getting a person to execute a bond while under duress, and putting him to duress in order to get him to execute a bond; and what is clear in this case is, that the defendant had the plaintiff arrested in order to get his decree satisfied, and when he was under arrest the bond was executed in order that he might be released; that is to say, the defendant did not have the plaintiff arrested in order that he might get this bond out of

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him, but to get the money due under the decree out of him. When the plaintiff was under arrest he executed this bond to obtain his release, so that he cannot be said to have consented under coercion as defined in s. 15, Act IX of 1872, though he may have consented while under coercion as it is ordinarily spoken of. The only question, therefore, that remains for determination is whether there was consideration given for the bond, looking back before the decree illegally given."

The District Judge remanded the case to the Munsif for the determination of this issue. The Munsif decided that the defendant had paid land-revenue for the plaintiff, and if the bond was for that money, it was not without consideration. On the case being returned to the District Judge it was contended on behalf of the plaintiff that the decree, and not the money paid by the defendant for the plaintiff for land-revenue, was the consideration for the bond, and that the decree being illegal, the consideration was illegal too. The District Judge observed as follows as regards this contention :—

"Assuming this to be the case, the bond recites that over and above the Rs. 81 due on the decree, the plaintiff took a further loan of Rs. 3 to pay stamp paper and registration charges for the bond, and it is admitted that he did do this. Here therefore there is a separate consideration clearly to the sum due under the decree, and though it is a small sum, it is none the less consideration which would prevent the cancellation of the bond on the ground of want of consideration. Consequently assuming the plaintiff's contention to be right, he is still not entitled to maintain a suit to cancel this bond. But I do not agree with the contention. The decree, apart from costs, represented the sum paid by the defendant for the plaintiff for government revenue, so the defendant did give the plaintiff good consideration, which the bond in reality recites, though the decree is spoken of. I therefore, on the grounds given here and in the order of remand, reverse the decision of the lower Court."

The plaintiff appealed to the High Court, contending (i) that an *ex-parte* decree, passed admittedly without jurisdiction, could not be held to be good consideration for a bond executed by the

judgment-debtor while in arrest in execution of such decree; (ii) that the consideration for the bond in suit was expressly mentioned therein to be the decree, and not the amount of revenue said to have been paid by the defendant for the plaintiff; (iii) that even if the consideration for the bond was such amount, the bond would not be valid and enforceable at law under the circumstances under which it was executed; and (iv) that the Rs. 3 admitted to have been received by the plaintiff for the cost of the bond could not form legal and valid consideration therefor.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad*, Lala *Jokhu Lal*, and Mr. *Simeon*, for the respondent.

The judgment of the Court (STUART, C.J., and TYRRELL, J,) was delivered by

TYRRELL, J.—We have given this case a long hearing and much consideration. The result is that we find the pleas in appeal to be valid. The bond obtained from the appellant was undoubtedly given when he was in duress, and it cannot be held that the small sum paid by the creditor for the charges of stamping and writing the document was in any legitimate sense of the phrase "consideration" for the bond. We decree the appeal with costs.

Appeal allowed

1882
March 24.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

GAURA (PLAINTIFF) *v.* GAYADIN (DEFENDANT).*

Certificate for collection of debts—Effect of certificate against debtors—Act XXVII of 1860, *s.* 4—*Cause of action.*

A judgment-debtor sued for a declaration that the son of the deceased decree-holder, to whom a certificate had been granted under Act XXVII of 1860 in respect of the debts due to his father's estate, was not competent to apply for execution of the decree, as, being illegitimate, he was not the legal representative of the deceased decree-holder. *Held* that the suit was not maintainable, the certificate under Act XXVII of 1860 being, under s. 4 of the Act, conclusive of the defendant's representative character, and a full indemnity to all persons paying their debts to him.

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* Second Appeal, No. 1005 of 1881, from a decree of Babu Pramoda Charan Banarji, Subordinate Judge of Allahabad, dated the 26th May, 1881, reversing a decree of Pandit Indar Narain, Munsif of Allahabad, dated 14th March, 1881.

1882

GAURA
v.
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THE plaintiff in this claimed a declaration that the defendant, who had sought to execute a decree against her, was not competent to execute the same, not being the representative of the decree-holder. The decree, which was one for money, had been obtained against the plaintiff by one Banwari on the 14th March, 1879. The latter died in February, 1880, and upon his death the defendant applied, as his son and heir, to the District Court for a certificate under Act XXVII of 1860 to collect the debts due to the estate of the deceased, and obtained it on the 14th August, 1880. On the authority of this certificate the defendant applied for execution of the decree. The plaintiff opposed this application on the ground that the defendant was not the legitimate son of the deceased decree-holder; but the Court executing the decree disallowed her objection, and allowed the decree to be executed. Thereupon the plaintiff instituted the present suit. She alleged that the defendant was illegitimate and therefore not competent to execute the decree. The Court of first instance gave the plaintiff a decree. On appeal by the defendant the lower appellate Court set aside this decree and dismissed the suit, on the ground that the plaintiff had no cause of action, and the suit was therefore not maintainable. The Court observed: "I am of opinion that she (plaintiff) had no cause of action: she is admittedly liable for the amount of the decree obtained against her by Banwari: the appellant (defendant) has obtained a certificate from the Judge under Act XXVII of 1860 to realize debts due to Banwari: this certificate is, under s. 4 of the Act, conclusive of his representative title against all debtors to the deceased, and it affords full indemnity to all debtors of the deceased paying their debts to him: the respondent (plaintiff) being a debtor of the deceased, the certificate obtained by the appellant (defendant) under Act XXVII of 1860 is conclusive of his representative title as against her, and as the payment of the debt to him will under s. 4 afford full indemnity to the respondent (plaintiff), she has no reason to come to court to contest his title: her suit would perhaps have been maintainable, if it had been alleged that by reason of the appellant's illegitimacy she was not liable to pay the amount of the decree to any one and was absolved from all liability for it, but no such allegation has been made by her: this suit is therefore not maintainable."

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In second appeal by the plaintiff it was contended that the fact that the defendant held a certificate under Act XXVII of 1860 did not preclude her from attacking his title to represent the decree-holder, more particularly as she had not been a party to the proceedings in which such certificate had been granted.

Munshi *Sukh Ram* and Babu *Jogindro Nath Chaudhri*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Ram Das Chakarbati*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—It is sufficient for us to say that the plaintiff-appellant had no cause of action. S 4 of Act XXVII of 1860 makes the certificate of the Judge to the defendant conclusive of his representative character, and was and is a full indemnity to all persons paying their debts to him. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1882 *March* 25.

GHULAM JILANI (DEFENDANT) *v.* IMDAD HUSAIN (PLAINTIFF).*

Vendor and purchaser—Covenant for good title to convey—Pre-emption—Construction of covenant.

An instrument of sale contained the following condition:—"Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and the costs of litigation." The purchaser having lost the property, by reason of a person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the costs incurred by him in defending such suit, basing his claim upon the condition set forth above. *Held* that the suit was not maintainable, as such condition referred to flaws or defects in the vendor's title, and was not applicable to a loss accruing to the purchaser from his disqualification to buy.

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* Second Appeal, No. 1041 of 1881, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 14th May, 1881, reversing a decree of Pandit Kashi Narain, Munsif of Agra, dated the 14th February, 1881.

1882

GHULAM JILANI v. IMDAD HUSAIN.

THIS was a suit in which the plaintiff claimed to recover Rs. 794, being the costs incurred by him in defending a certain suit. On the 15th May, 1877, the defendant sold his share in a certain village to the plaintiff for Rs. 1,500. One of the conditions in the instrument of sale was as follows:—"Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser, or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I, my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and the costs of litigation." In July, 1877, after the sale, one Dabi Ram, a co-sharer in the village in which the property was situate, sued the plaintiff and defendant to enforce his right of pre-emption in respect of the property. They defended this suit, but Dabi Ram succeeded in obtaining a decree against them for possession of the property by virtue of his right of pre-emption. In the present suit the plaintiff claimed to recover from the defendant the costs incurred by him in the pre-emption suit, basing his claim on the condition in his sale-deed set forth above. The Court of first instance dismissed the suit, holding that the plaintiff was not entitled under the condition to recover the costs of the pre-emption suit. On appeal by the plaintiff the lower appellate Court held that the terms of the condition were wide enough to take in the plaintiff's claim, and gave him a decree.

On second appeal by the defendant it was contended on his behalf that the lower appellate Court had misconstrued the deed of sale, and under its terms the plaintiff was not entitled to recover the costs of the pre-emption suit.

Mr. *Colvin* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (BRODHURST, J., and TYRRELL, J.) was delivered by

TYRRELL, J.—We do not concur in the lower appellate Court's reading of the guarantee clause in the sale-deed. It refers in our opinion to flaws or defects in the title conveyed by the vendor, and is

not applicable to a loss accruing to the vendee by reason of his disqualification to buy. In this view of the case we must annul the decree of the lower appellate Court, restore that of the Munsif, and decree this appeal with costs.

Appeal allowed.

CIVIL JURISDICTION.

1882 *March* 30.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

IN THE MATTER OF THE PETITION OF BADRI PRASAD *v.* SARAN LAL AND ANOTHER.*

Execution of decree—Attachment of property in execution of decrees of two Courts—Postponement of sale by Court of higher grade—Sale of property under order of Court of lower grade—Invalidity of sale—Act X. of 1877 *(Civil Procedure Code), ss.* 285, 311.

When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the Court of the highest grade, where such Courts are of different grades, or the Court which first effectuated the attachment, where such Courts are of the same grade, is, under s. 285 of the Civil Procedure Code, the Court which has the power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds, and of providing for their distribution under s. 295.

Held, therefore, where the immoveable property of a judgment-debtor was attached in execution of several decrees, one a Munsif's decree, and the rest a Subordinate Judge's decrees, and the Subordinate Judge postponed the sale of such property, but the Munsif refused to do so, and such property was sold in execution of the Munsif's decree, that the sale was void as having been been made in pursuance of the order of a Court which had no jurisdiction to direct it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Ajudhia Nath* and Lala *Harkishan Das,* for the petitioner.

The *Senior Government Pleader* (Lala *Juala Prasad*), Pandit *Bishambhar Nath,* and Munshi *Sukh Ram,* for the opposite parties.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.,) was delivered by

STRAIGHT, J.—This is an application for revision under s. 622 of the Civil Procedure Code. It appears that three persons, Badri Prasad, Gulab Chand, and Ajudhia Prasad, severally held decrees

* Application, No. 180 of 1881, for revision under s. 622 of Act X of 1877 of an order of Maulvi Zahur Husain, Munsif of Aligarh, dated the 3rd June, 1881.

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IN THE MATTER OF THE PETITION OF BADRI PRASAD v. SARAN LAL.

of the Court of the Subordinate Judge of Aligarh against one Moti Lal, which were in course of execution. There was also a fourth decree against the same judgment-debtor, which had been obtained by Ballabh Singh from the Court of the Munsif of the same place. Attachments of the immoveable property of Moti Lal had been made by both Courts, and notifications of sale issued. It appears that shortly before the date fixed by the Subordinate Judge for the auction, the judgment-debtor applied to him for a postponement of sale, and it was granted. He preferred a like application to the Munsif, who, however, refused to permit any further delay, and in execution of the decree of the Munsif's Court the property was sold on the 20th April, 1881, one Saran Lal being the purchaser. Thereupon Badri Prasad and Ajudhia Prasad, two of the decree-holders of the Subordinate Judge's Court, applied to the Munsif to set aside the sale on the ground that he was precluded from ordering it by the terms of s. 285 of the Procedure Code. This application was, however, refused, the Munsif holding that it was not competent for the applicants to make objection to the sale, they not being decree-holders of his Court, nor persons whose immoveable property had been sold, in other words, they not coming within the category of s. 311. Badri Prasad alone petitions this Court, and in substance asks us to revise the order of the Munsif, directing the sale of the 20th April, 1881, and to set the sale itself aside on the ground that it was held without jurisdiction. It will be observed that the application is based not upon material irregularity in the publishing or conducting the sale, but upon the ground that it was "*ab initio*" void by reason of the incompetence of the Munsif to order it. If may be doubtful whether the applicant could properly ask the Munsif to declare his own proceeding void, but as a person who has undoubtedly been most injuriously affected thereby, we think that he is fully entitled to come to this Court, and ask it to exercise its powers of revision under s. 622 of the Civil Procedure Code upon a question so essentially important as that of jurisdiction. The point then arises whether, having regard to the fact that there were three decrees of the Subordinate Judge's Court in respect of which the property of Moti Lal had been attached, as well as the one decree of his own Court, the Munsif, in face of the language of s. 285 of the Procedure Code,

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IN THE MATTER OF THE PETITION OF BADRI PRASAD v. SARAN LAL.

was entitled to order the sale of the 20th April, 1881? We think not. It appears to us that when several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the law contemplates, no matter whether such Courts be of the same or different grades, that *one* Court and *one* Court only shall have the power of deciding objections to the attachment; of determining claims made to the property; of ordering the sale thereof, and receiving the proceeds, and of providing for their distribution under s. 295. Where the Courts are of different grades the one upon which this duty devolves is that of the highest grade; where they are of the same grade, that which first effectuated the attachment. We think that for the most obvious reason of convenience, and as a precaution against confusion in the execution of decrees, this is the proper construction to place on s. 285 of the Procedure Code. Seeing the notoriety that now has to be given to attachments it is in the highest degree improbable that one Court will be unaware of a prior subsequent attachment by another, and in the matter now before us it is admitted that the Munsif was well aware of all that had been done in reference to the three decrees of the Subordinate Judge's Court. In our opinion therefore the sale of the 20th April, 1881, was a bad sale, as being held in pursuance of the order of a Court that had no jurisdiction to direct it, and such order and sale must be, and are hereby, set aside.

This application is accordingly allowed, but we make no order as to costs.

Application allowed.

1882
March 30.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

PIRTHI PAL SINGH AND OTHERS (PLAINTIFFS) *v.* HUSAINI JAN AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Succession—Debts—Suit against one of the heirs of a deceased person for debt.

The heirs to a deceased Muhammadan divided his estate among themselves according to their shares under the Muhammadan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt *Held* that, inasmuch as such heirs had not, by sharing in the estate, rendered themselves liable for the whole of such debt, Muhammadan law allowing the heirs of a deceased person to divide his

* Reference No. 30 of 1882 under s. 617 of Act X of 1877.

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estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken.

Hamir Singh v. *Zakir* (1) referred to.

THIS was a reference to the High Court by Mr. R. D. Alexander, Judge of the Court of Small Causes at Allahabad. The facts of the case, and the point on which the Judge entertained doubt, and his opinion on the point, were stated by him as follows:—

"On the 2nd August, 1878, Imam-ud-din Jan, deceased, executed a promissory note in favour of Suraj Bakhsh Singh, deceased, for the sum of Rs. 25, bearing interest at the rate of Rs. 15 per cent. This promissory note matured on the 10th November, 1878. Imam-ud-din died shortly after its execution. On the 9th November, 1881, the day before its limitation expired, the plaintiffs filed the present suit against the widow and son of the deceased, alleging them to be the heirs, and in possession of the estate. On the 16th January, 1882, appearance was made for the defence, and a plea was raised that the two defendants were not the sole heirs, but that there were two daughters of the deceased also heirs; one Banni Jan who was of age and married, and who had taken her share of the deceased's estate, and one Wahid-ul-Jan, a minor, who was still living under the care of her mother the first defendant, and for whose guardianship, as well as for that of the second defendant, defendant No. 1 had taken out a certificate from the District Court under Act XL of 1858. It was admitted by the plaintiffs that these facts were correct, and that the deceased Imam-ud-din had left four heirs, and not two only, and that Banni Jan had taken her share, *viz.*, $\frac{7}{32}$ of the deceased's estate. The shares therefore of the heirs were as follows:—defendant No. 1, widow, $\frac{4}{32}$, defendant No. 2, son, $\frac{14}{32}$, Banni Jan, $\frac{7}{32}$, Wahid-ul-Jan $\frac{7}{32}$.

"Under s. 32, Act X of 1877, Banni Jan and Wahid-ul-Jan were added by the Court as defendants, and summonses were issued and made returnable on the 20th January. On that date they were returned unserved, and the Court declined to issue fresh summonses, because it was clear that, as regarded the added defendants, the suit was barred by limitation under the provisions of s. 22, Act

(1) I. L. R., 1 All. 57.

XV of 1877. They were made parties on the 16th January, 1882, and the period allowed by law for suing on the promissory note terminated on the 10th November, 1881.

"On this the counsel for the plaintiffs contended (*a* that he was entitled to a decree for the whole sum claimed against the two original defendants, who in turn might recover from the others heirs their shares of the debt by a suit for contribution; (*b*) that if he was not entitled to a decree in full, he was at all events entitled to a decree in part, such part being represented by the shares taken by the defendants in the deceased's estate, *i.e.*, nine-sixteenths. He therefore claimed a decree for nine-sixteenths of Rs. 45. The counsel for the defence urged against this (*a*) that it would not be equitable to saddle the original defendants with the whole of the debt, and (*b*) that the plaintiffs, having sued the original defendants as sole heirs and in possession of the whole estate of the deceased, could not now turn round and claim this proportionate relief.

"The questions therefore I would submit for the decision of the Hon'ble Court are—(i) On the facts as stated should a decree be passed against the original defendants for the whole of the debt claimed, or (ii) on the facts as stated should a decree be passed against the original defendants for nine-sixteenths of the debt claimed, their shares in the estate of deceased being nine-sixteenths.

"As to the first question, I do not think it would be equitable to decree the whole debt against the original defendants, because I am doubtful if an action for contribution could be maintained successfully by them against the other heirs for their shares. I assume that all that can be recovered in a suit for contribution is a sum legally payable by the defendant which the plaintiff has paid for him. But as by the other heirs no part of this debt would appear to me to be legally payable, because the claim of the creditor as against them is barred by limitation, the effect therefore of giving a decree against the original defendants, if it were followed by a suit for contribution, would virtually, if the latter claim were decreed, be to revive a claim barred by limitation. It was held in *Tillakchand Hindumal* v. *Jitamal Sudaram* (1) that an executor may pay a debt justly due by his testator, though barred by the

(1) 10 Bom. H. C. R. 206.

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statute of limitation, and will in equity be allowed credit for such payment. Can it be equally argued that, where some heirs have been obliged to pay a debt due from the whole estate of a deceased, the recovery of such debt as against the other heirs being barred by limitation, the former can recover from the latter in a suit for contribution? If it cannot, then I am of opinion that it would be inequitable to allow the recovery of the whole debt against the two original defendants. Perhaps some guide might be found in considering the provisions of s. 28, Act XV of 1877. If in the case of suits to recover debts the right to the debt is extinguished under that section, as well as the remedy barred, it would appear to me that as far as the added defendants are concerned there would be an end of the liability "*in toto*." But in *Mohesh Lal* v. *Busunt Kumaree* (1) it was held that, as far as regards debts, the Indian Limitation Acts merely bar the remedy, but do not extinguish the right. In *Ram Chander Ghosaul* v. *Juggutmonmohiney Dabee* (2) it was held that s. 28, Act XV of 1877, extended the doctrine of the extinguishment of the right to property other than land, but Garth, C. J. queried whether this principle would apply to debts. In *Abhoy Churn Pal* v. *Kalee Pershad Chatterjee* (3) White, J. said: "A suit for rent is, I think, a suit for the possession of property within the meaning of that section." It might be urged therefore that though *quoad* the creditor the remedy was barred, still the debt was not extinguished, and that a suit for contribution would lie because the right was still in existence.

"There is another matter to be considered, and that is whether according to Muhammadan law a creditor is entitled to recover from one or two out of more heirs, all of whom have taken the estate, more than the share of the debt the share of the estate taken by the heir represents. There is a passage in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (4) quoted from the Hedaya, Bk. XX, chap. 4:—"If an heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to law, each is only obliged to pay his own share." If that is the law, then it would appear clear that the utmost the plaintiffs could recover in this case would be nine-sixteenths

(1) I. L. R., 6 Calc. 340.
(2) I. L. R., 4 Calc. 283.
(3) I. L. R., 5 Calc. 949.
(4) I. L. R., 4 Calc. 142.

of the debt, and that the answer to the first question must be in the negative. And this brings me to the consideration of the second question. In the Calcutta case just quoted the passage from the Hedaya goes on to say: "The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir." It does not appear clear whether this means non-recourse, so as to establish the individual liability of an heir in whose hands there is only a portion of the estate, or the liability of the whole estate as represented by him alone. The passage goes on to explain that the reason of this is that, although one of the heirs may act as plaintiff in a case on behalf of the others, yet he cannot act as defendant on their behalf unless the whole of the effects be in his possession. It would appear to come to this. Must the whole estate be represented by all the heirs in possession in a suit before the creditor is entitled to recover his debt against one heir in possession of part of the estate if he choses, or can he recover proportionately from each heir according to the share he has taken in the estate. In *Hamir Singh* v. *Zakia* (1) the Court quoted the Hedaya, Bk. XXVI:—"While then the heirs might lawfully take possession of an estate not completely involved in debt, the creditors have the right to sue such of the heirs as have taken the estate; 'but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir.'" In the present case the creditor has had recourse for the payment of his debt to two heirs who have not the whole estate, and it is owing to his own laches and carelessness that the whole estate was not properly represented. His suit too against the two heirs was not brought for a considerable time after the death of his debtor. It would appear, however, that, if the plaintiffs are entitled to a proportionate decree, the Court would be justified under s. 28, Act X of 1877, in making a decree against the defendant No. 1 for two-sixteenths and against the defendant No. 2 for seven-sixteenths of the sum claimed, and apart from the consideration whether such liability is recognized by the Muhammadan law, on which question I feel great doubt, I am of opinion that that would be the most equitable way of deciding the case. At the request however of the pleader for the plaintiffs, who maintained that they are legally

(1) I. L. R., 1 All. 57.

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PIRTHI PAL SINGH v. HUSAINI JAN.

entitled to a decree for the whole sum claimed, and being doubtful whether under Muhammadan law the defendants are liable at all, I refer the case for the decision of the Hon'ble High Court."

Munshi *Hanuman Prasad*, for the plaintiffs.

Munshi *Kashi Prasad*, for the defendants.

The judgment of the Court (OLDFIELD, J., and BRODHURST, J.) was delivered by

OLDFIELD, J.—Under the Muhammadan law the heirs of a deceased person are permitted to divide the estate notwithstanding the circumstance that a small debt is due, and creditors have a right to sue the heirs in possession for recovery of a debt, "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir."—*Hamir Singh* v. *Zakia* (1).

In this case it is admitted by plaintiffs that defendants are not the sole heirs and that they have only divided and obtained their proper share of the estate, and by Muhammadan law under the circumstances of this case they are permitted to do so; and they will not, we think, thereby incur a liability to a creditor, suing them for recovery of a debt, for the whole debt due to him by the deceased, and a creditor could not in a suit brought against them bind the other heirs. In this view of the law we consider that the creditor can recover individually from heirs in the position of defendants the share of the debt for which they are liable.

The answer to the first question will be in the negative, and the second question in the affirmative.

Order accordingly.

1882
March 7.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* KALLU.

Covenanted Magistrate of the third class on tour in Division of a District—Subordination to Magistrate of the Division—Act X of 1872 (*Criminal Procedure Code*), *ss.* 41, 44, 46, 284.

A Magistrate of a Division of a District made over, under s. 44 of Act X of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction,

(1) I. L. R., 1 All. 57.

found the accused person guilty, and considering that the accused person ought to receive more severe punishment than he was competent to inflict, under the provisions of s. 46 of Act X of 1872 submitted his proceedings to the former. The former thereupon, under the provisions of the same section, passed sentence on the accused person.

Held that the latter Magistrate was subordinate to the former, within the meaning of s. 41 of Act X of 1872, and the procedure of the Magistrates was therefore according to law.

Held also that, assuming that the latter Magistrate was not "subordinate" to the former, the provisions of s. 284 of Act X of 1872 would not have been applicable, as those provisions do not refer to the illegality of a sentence or to the case of a Magistrate transferring a case who has no power of transfer, but to the invalidity of a conviction for want of jurisdiction.

THIS was a reference to the High Court by Mr. C. J. Daniell, Sessions Judge of Moradabad. The facts which gave rise to the reference were as follows:—In December, 1881, Mr. Thornton, a Magistrate of the third class, appointed to the Moradabad District, was on tour in the Sambhal-Hasanpur Division of that District. While so employed the Magistrate of that division, Mr. E. Galbraith, made over a case of theft to him for trial. Finding the accused person, one Kallu, guilty, and considering that he ought to receive a more severe punishment than he could inflict, Mr. Thornton, under s. 46 of the Criminal Procedure Code, submitted his proceedings and forwarded the accused person to Mr. Galbraith. The latter passed a sentence on the accused person of one year's rigorous imprisonment. Kallu appealed to the Sessions Judge of Moradabad against this sentence. The Sessions Judge, Mr. C. J. Daniell, before passing a final order in the case, having regard to the concluding words of s. 46 of the Criminal Procedure, called on the Magistrate of the Moradabad District to forward a copy of his order appointing Mr. Thornton to be subordinate to Mr. Galbraith. In answer to this requisition the Magistrate of the Moradabad District stated that he had passed no special order directing Mr. Thornton to act as subordinate to the Magistrate of the Sambhal-Hasanpur Division, and that no such order was necessary, as Mr. Thornton at the time he referred the case to Mr. Galbraith was on tour in that division, and therefore, under s. 46 of the Criminal Procedure Code, was subordinate to Mr. Galbraith. The Sessions Judge, in disposing of Kallu's appeal, held that Mr. Thornton was not subordinate to Mr. Gal-

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braith for the purposes of s. 46 of the Criminal Procedure Code, as he had not been specially appointed to be so, and therefore was not a "Magistrate in a Division of a District" within the meaning of s. 41, and as such under that section subordinate to the Magistrate of the Division, and that the fact of his being corporeally present in the Sambhal-Hasanpur Division on a certain date did not make him subordinate to Mr. Galbraith. Holding therefore that Mr. Galbraith's order was illegal, as it was passed on a reference to him by a Magistrate not subordinate to him, the Sessions Judge, referring to the provisions of s. 284, Criminal Procedure Code, set aside the conviction of Kallu and the sentence passed on him, and directed his trial "by a Court having competent jurisdiction."

The Magistrate of the Moradabad District, Mr. T. B. Tracy, being of opinion that Mr. Thornton, while on tour in Mr. Galbraith's Division, and in the exercise of his functions as a Magistrate of the third class in respect of a case referred to him by Mr. Galbraith, was subordinate to the latter, under the terms of s. 41, and therefore that Mr. Galbraith had power to deal with the case under s. 46, requested the Sessions Judge to refer to the High Court the question whether Mr. Galbraith's order was made with or without jurisdiction, and the Sessions Judge accordingly referred such question to the High Court.

The High Court (STRAIGHT, J. and TYRRELL, J.) made the following order on the reference :—

TYRRELL, J.—Mr. Thornton is a covenanted Assistant Magistrate of the third class appointed to the District of Moradabad, and as such he is of course subordinate to the Magistrate of the District. In December, 1881, he was on duty making a winter tour in the parganas of Sambhal and Hasanpur of the Moradabad District. These two parganas have been constituted a Division of the District in the sense of s. 40 of the Criminal Procedure Code, and a Subordinate Magistrate, Mr. Galbraith, is the Magistrate of that division of the District. In this capacity he exercises the powers of s. 28 of the Code, including the power to make over cases for trial to a Subordinate Magistrate (s. 44), and to pass sentence on proceedings recorded by a Subordinate Magistrate

(s. 46). Mr. Galbraith made over a case of theft for trial to Mr. Thornton, who convicted the accused and recorded a finding of guilty; but refraining from passing sentence submitted his proceedings and forwarded the convict under s. 46 to Mr. Galbraith for severer punishment than Mr. Thornton was competent to impose. The convict was sentenced by the Divisional Magistrate to one year's imprisonment. The Sessions Judge in appeal annulled this sentence as well as Mr. Thornton's conviction: and "directed the case to be tried by a Court having competent jurisdiction." The Judge recorded his opinion that "the order of Mr. Galbraith, Magistrate of the Sambhal-Hasanpur Division, was passed on a reference to him by an Assistant Magistrate who was *not* subordinate to him in the sense of s. 46 of the Code." If this were the only reason for the Judge's order he would have been undoubtedly wrong in applying to the case the mandatory provisions of s. 284 of the Procedure Code, which refer not to the illegality of a sentence but to the invalidity of a conviction by reason of want of competence in the Court to try the offence. But the conviction in the present case was not open to the objection contemplated in s. 284. The offence (s. 379, Indian Penal Code) of which Mr. Thornton convicted the accused was triable by Mr. Thornton, and the conviction was unimpeachable in respect of his competence to try the offence charged. It was the legality of the proceedings of Mr. Galbraith in treating Mr. Thornton as a Magistrate subordinate to him in the sense of s. 41 of the Criminal Procedure Code that was challenged before the Judge, and forms the question we are asked to determine. If Mr. Galbraith had no power to make over the case under s. 44 to Mr. Thornton, the trial would be open to objection on that score, but the conviction would not for that reason only be necessarily unsustainable under the provisions of s. 284. The point for determination then was whether the provisions of s. 41 of the Code were applicable to the relative positions of Messrs. Galbraith and Thornton *inter se*.

Was Mr. Thornton, who was admittedly a Magistrate officially employed for the time in the Sambhal-Hasanpur Division of the Moradabad District, "subordinate (as such) to the Magistrate of that Division of the District;" or was he subordinate to the Magistrate of the District alone, and therefore competent to hear such cases only

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as were made over for trial to him by that Magistrate, and bound to submit cases under s. 46 to that officer's Court exclusively? The Sessions Judge took the latter view, and regarded the circumstance of Mr. Thornton's presence and occupation in Mr. Galbraith's Division as a mere geographical accident, and immaterial to the question before him. This reading of the law of Chapter IV of the Criminal Procedure Code does not commend itself to us either on considerations of principle or of convenience. In the ordinary course of procedure the theft committed in the Sambhal-Hasanpur Division was triable in that division under the jurisdiction and general functions of its Magistrate. Mr. Thornton has no original criminal jurisdiction in any part of the Moradabad District. He can try such cases only as are referred to him for trial by competent Magistrates. The Magistrate of Moradabad may refer to him for trial any case, within the competence of a third class Magistrate, committed in any part of the Moradabad District. But in respect of offences of this class committed in the Sambhal-Hasanpur Division the Magistrate could only do so, after having first in the exercise of the control reserved to him by s. 40 removed the case from the jurisdiction of the Divisional Magistrate. The jurisdiction of the Magistrate of the District is of course not ousted or excluded by that of the Divisional Magistrate: their jurisdictions are co-ordinate. But the jurisdiction of the Divisional Magistrate is the ordinary original jurisdiction of his division; and whatever the Magistrate of the District might do in this connection with regard to offences committed outside the Division, the Divisional Magistrate is competent to do with regard to offences within his local jurisdiction. But was Mr. Thornton in December, 1881, "subordinate" to the Divisional Magistrate. By the terms of s. 41 of the Procedure Code "every Magistrate in a Division of a District shall be subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District." We have no doubt that the persons here referred to are ordinarily and in the first instance the more or less permanent local Magistrates of the parganas composing the division. In the case before us they would be the Tahsildars and "Special Magistrates" attached to the Sambhal and Hasanpur parganas. But if we are right in assuming that in

December, 1881, Mr. Thornton was officially located in that division, whether temporarily or otherwise, in the discharge of his public duties, and not as a mere visitor or casual resident, we see no sufficient reason for holding that he did not thereby come within the provisions of s. 41 as a Magistrate for the time being not only in but also of the Sambhal-Hasanpur Division of the Moradabad District. It seems to us that this is a legitimate and reasonable view of the question : and that the procedure of the Magistrates was not only recommended by obvious convenience, but was also justifiable on strict application of the terms of the law.

FULL BENCH.

1882
March 9.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

NAIK RAM SINGH (DECREE-HOLDER) *v* MURLI DHAR AND ANOTHER (JUDGMENT-DEBTORS)*

Landholder and tenant—Sale of occupancy-right in execution of decree—Act XVIII of 1873 (*N.-W. P. Rent Act*), *s.* 9—*Act XII of* 1881 (*N.-W. P. Rent Act*) *ss.* 2, 9.

Held that a landholder, who had attached the occupancy-right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of a landholder to bring such a right to sale in execution of a decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.

NAIK Ram Singh, the proprietor of certain land, on the 30th March, 1881, applied for, and obtained, in execution of a decree which he held against Murlidhar and a certain other person, the occupancy-tenants of such land, an order for the attachment of the occupancy-rights therein of his judgment-debtors, with a view to the sale of such rights. On the 1st April, 1881, Act XII of 1881, which repealed Act XVIII of 1873, came into force. After Act XII of 1881 came into force the judgment-debtors preferred an objection to the sale of their occupancy-rights on the ground that the transfer of such rights in execution of decree was prohibited by s. 9 of that Act. The Court executing the decree allowed this

* First Appeal, No. 101 of 1881, from an order of Maulvi Sultan Hasan, Subordinate Judge of Agra, dated the 9th June, 1881.

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objection, and released the occupancy-rights of the judgment-debtors from attachment. The decree-holder appealed to the High Court, contending that, as before Act XII of 1881 came into force the proprietor of land, who held a decree against the occupancy-tenant of such land, was entitled to bring the occupancy-right of his judgment-debtor to sale in execution of such decree, and as he had caused the occupancy-rights of his judgment-debtors to be attached in execution of his decree against them before that Act came into force, his claim to bring such rights to sale was not affected by that Act, regard being had to the provisions of s. 2 thereof.

The appeal came for hearing before Oldfield and Tyrrell, JJ., by whom the question raised by the appellant's contention was referred to the Full Bench, the order of reference being as follows:

OLDFIELD, J.—The appellant before us is the zamindar of the estate on which the respondents (his judgment-debtors) are ex-proprietary, that is to say occupancy, tenants. The appellant, on the 30th March, 1881, applied to the Court executing his decree for the attachment, preparatory to sale, of this cultivatory tenure of the respondents. His application was granted, and an order for attachment was made on the 31st March, 1881. On the 1st April, 1881, the new Rent Law, Act XII of 1881, came into force in these Provinces. Under this law (s. 9) a tenure of the character of that of the respondents is not transferable in the execution of a decree. But, under the rulings of the Allahabad High Court, in respect of tenures of this class, under the terms of Act XVIII of 1873, the appellant, being the zamindar, was, on the date on which he made his application, entitled to bring the respondents' cultivatory right under attachment and transfer in execution. The question now arises,—how the provisions of s. 2 of Act XII of 1881, read with those of s. 9 of the same Act, affect the appellant's claim. Under s. 9 "no right of occupancy other than that of tenants at fixed rates shall be transferable in execution of a decree:" and s. 2 enacts that all rights acquired and liabilities incurred under the Act No. XVIII of 1873 shall, so far as may be, be deemed to have been acquired and incurred under the Act No. XII of 1881. We refer this question to the Full Bench of the Court.

Mr. *Conlan*, for the appellant.

Munshi *Sukh Ram* and Lala *Har Kishan Das*, for the respondents.

The judgment of the Full Bench (STUART, C. J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, J.J.) was delivered by

OLDFIELD, J.—The part of s. 2, Act XII of 1881, referred to in this reference is to the effect that "all rules and appointments made, notifications and proclamations issued, authorities and powers conferred, leases granted, rents fixed, rights acquired, liabilities incurred, and places appointed under that Act (*i. e.*, Act XVIII of 1873) shall, so far as may be, be deemed to have been made, issued, conferred, granted, fixed, acquired and appointed hereunder." That is, so far as effect can be given to them consistently with the provisions of Act XII of 1881, they are to be deemed to have been made under that Act and to be governed by the provisions of that Act. The section so far as the question before us is concerned is not to be considered to be a saving clause; and to estimate the effect of Act XII of 1881 upon any right of sale in respect of a tenant's right of occupancy which s. 9, Act XVIII of 1873, allowed to a landlord, we must refer to s. 9 of Act XII. That Act repeals Act XVIII of 1873, but it does more than merely repeal it, for by its 9th section it expressly enacts that no right of occupancy, except that of tenants at fixed rates, shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favor of whom as co-sharers such right originally arose or who have become by succession co-sharers therein.

In the case before us the landlord had proceeded to attach the occupancy-right of the tenant in execution of his decree before Act XII of 1881 came into force, but he cannot proceed to sell the right, after that Act came into operation, since such a right has been expressly declared to be not liable to sale.

Had a sale taken place before Act XII of 1881 came into force, a right in property would have been created which is not affected by the repeal of Act XVIII of 1873, or by any provision in Act XII of 1881: not so a right of sale under Act XVIII of 1873, which is all the landlord had, and which s. 9 of Act XII of 1881 has in express terms taken away.

1882
March 17.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Straight.

AUGUSTIN (PETITIONER) *v.* AUGUSTIN (RESPONDENT).

Husband and wife—Judicial separation—Charge against wife of adultery—Cruelty.

A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and without reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation.

THIS was a petition by Constance Juliet Augustin for judicial separation from her husband, Alexander Clement Augustin, on the ground of cruelty. The petitioner charged the respondent with having treated her with cruelty on several occasions, but eventually agreed to limit the charges of cruelty to the one contained in the eight paragraph of her petition, which was as follows :—"That on the 29th October, 1881, shortly after your petitioner had left Simla, the said A. C. Augustin brought a criminal charge against one of your petitioner's relations of having committed adultery with your petitioner, such charge being absolutely false and without foundation."

The issues framed were :—"Did the respondent charge the petitioner, on the 29th. October, 1881, with adultery with one David Rutledge? Was such charge wilfully, maliciously, and without reasonable or probable cause made by the respondent against the petitioner?"

It was proved that the respondent had instituted criminal proceedings against the David Rutledge mentioned in the first of the issues above set forth, charging him with having committed adultery with his wife, the petitioner, and that such charge had been dismissed as groundless.

Mr. *Hill*, for the respondent, objected to the petition being entertained on the ground that, even if the respondent had falsely, maliciously, and without reasonable or probable cause charged the petitioner with adultery with Mr. Rutledge, such conduct did not amount to cruelty which would justify the Court in granting a decree for judicial separation.

Messrs *Conlan* and *Saunders*, for the petitioner.

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STRAIGHT, J.—I am very clearly of opinion that this petition cannot be sustained. The main and indeed only point I have to consider is, whether, assuming that the charge of adultery alleged in regard to the petitioner and involved in the prosecution of Mr. Rutledge at Simla was preferred without reasonable and probable cause, and wilfully and maliciously, such act on the part of the respondent does or does not amount to legal cruelty, so as to entitle the petitioner to a judicial separation? To my mind, if all this were established, which for the purpose of argument is conceded by the counsel for the respondent, no case would be made out justifying the interference of this Court. Under these circumstances I have no alternative but to dismiss the petition, but no order will be made as to costs.

CRIMINAL JURISDICTION.

1882
March 25.

Before Mr. Justice Oldfield.

IN THE MATTER OF THE PETITION OF GANGA DAYAL AND OTHERS.

Pleader—Mukhtar—Illegal practising—Act XVIII of 1879 (*Legal Practitioners' Act*), *ss.* 10, 32.

A pleader or mukhtar practising in contravention of the provisions of s. 10 of Act XVIII of 1879 is punishable under s. 32 of that Act only by the Court before which he has so practised.

Two pleaders and a mukhtar, who had been duly authorized to practise in the Courts of the Cawnpore District, appeared in a case in the Court of the Deputy Magistrate at Kanauj, in the Fatehgarh District. For so doing they were convicted by the Magistrate of the Fatehgarh District, under s. 32 of Act XVIII of 1879, for acting in contravention of the provisions of s. 10. They applied to the High Court to revise the order of the Magistrate on the ground, amongst others, that he was not competent to proceed against them under s. 32 of Act XVIII of 1879, as they had not practised in his Court.

Mr. *Ross*, for the applicants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

OLDFIELD, J.—The objection to the conviction that the Magistrate had no jurisdiction is, in my opinion, valid. The conviction

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IN THE MATTER OF THE PETITION OF GANGA DAYAL.

is under s. 32, Act XVIII of 1879, for practising in the Court of the Subordinate Magistrate in contravention of the provisions of s. 10 of the Act. S. 32, however, renders a person practising in a Court liable by order of such Court to a fine. The Court in this instance, which might impose the fine, is that of the Subordinate Magistrate, and not that of the Magistrate of the District, who would not have jurisdiction under the terms of the section. The conviction is set aside and the fine will be refunded.

1882
April 1.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

SHOHRAT SINGH (DECREE-HOLDER) *v.* BRIDGMAN (JUDGMENT-DEBTOR).*

Execution of decree—The decree to be executed, where there has been an appeal—Costs.

Held that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing such decree.

THIS was a reference to the Full Bench by Straight and Duthoit, JJ. The facts out of which the reference arose and the point of law referred are stated in the order of reference, which was as follows:—

STRAIGHT and DUTHOIT, JJ.—This is an appeal from an order of the Judge of Gorakhpur, reversing an order of the Munsif of Bansi, in the matter of an application of Shohrat Singh, for the execution of a decree held by him against John Hall Bridgman. The questions at issue between the parties were as regards the amount for which execution of decree should be allowed. We are concerned in second appeal with two items only, *viz.*, (i) one of Rs. 404 (Rs. 101 a year for four years), which the Munsif allowed to the decree-holder as mesne profits of the Sadu Nagar ferry, but the lower appellate Court has disallowed; (ii) one of Rs. 40-4-0, on account of costs prior to decree, with interest (Rs. 33-12-0 principal, Rs. 6-8-0 interest).

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* Second Appeal, No. 23 of 1881, from an order of R. F. Saunders, Esq., Judge of Gorakhpur, dated the 12th January, 1881, reversing an order of Maulvi Nazar Ali, Munsif of Bansi, dated the 18th August, 1880.

(After disposing of the question relating to the first item, the order continued:) The decision of the question at issue as regards the latter item is matter of greater difficulty. The suit which resulted in the decree now under execution was originally decided in the Court of the Munsif of Bansi. It was next heard in appeal by the Subordinate Judge of Gorakhpur, who reversed the Munsif's decree, and it was finally disposed of in this Court, the decree of the Subordinate Judge being affirmed in second appeal.

The decree of the Subordinate Judge contains an order in these terms:—"It is also ordered and decreed that the respondent aforesaid do pay to the appellant aforesaid Rs. 195-6-0 on account of costs in the lower Court charged against him, with future interest." But as a fact the costs in the Munsif's Court were Rs. 161-10-0, not Rs. 195-6-0. The heading of the decree of this Court for costs in the district is blank.

The lower appellate Court has held that the substitution of Rs. 195-6-0 for Rs. 161-10-0 was a mere clerical error, which it is not fair to direct the judgment-debtor to further proceedings to get put right. It has therefore corrected the supposed mistake itself, and allowed under this item Rs. 161-10-0.

The learned pleader for the appellant has argued that in the execution department any amendment of the decree under execution is illegal and invalid. The learned counsel for the respondent, on the other hand, contends that as a matter of fact—the decision of their Lordships of the Privy Council in *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy* (1) notwithstanding—the decree of each several Court is in a case of this kind that which is actually executed; and he urges with much force that, if the doctrine of *novatio* of the debt of record by each subsequent decree, or in other words, of the merger of the decree of the lower in that of the higher Court, is in this case to be followed, it is the judgment-creditor, not his client, who will suffer, for the decree of the Subordinate Judge is that of an intermediate Court only, and it is itself superseded by the decree of the High Court, under which even the item of Rs. 161-10-0 is not recoverable.

(1) 10 B. L. R. 101.

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The point raised in these pleadings seems to us to be one of much nicety and difficulty. We therefore refer to a Full Bench of this Court the following question :—

"When a suit is heard in first or second appeal, and a decree passed, is the decree of the Court of last instance, the sole decree which is capable of execution, or may the specifications contained in the decrees of the lower Court or Courts be referred to and enforced by the Court to which the application for execution has been made?"

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the appellant.

Mr. *Howard*, for the respondent.

The judgment of the Full Bench (STUART, C. J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.) was delivered by

TYRRELL, J.—In our opinion the appellate decree is the final decree and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal was made. If such final decree is drawn up with proper care and attention to the provisions of the law, it will necessarily contain, *inter alia*, "a correct statement of the amount of costs incurred in the appeal (*a*), and by what parties (*b*), and in what proportions (*c*), such costs, and also the costs in the suit (*d*), are to be paid"—*vide* ss. 206, 519 and 587 with Form No. 176, sch. iv, Act X of 1877. If on the other hand an error or defect in any of these particulars is found or alleged in such final decree, it can be amended and supplied by the Court making the decree and by no other—s. 206 *id.* We may add to avoid future controversy or doubt that we have not overlooked the provisions of s. 638 of the Civil Procedure Code, which exempt Chartered High Courts in the exercise of their appellate jurisdiction from the mandatory terms of s. 579 of the Code. But in the absence of any rules specially framed by the Court for the preparation of its appellate decrees, they should be, and we believe ordinarily are, drawn up in conformity with the rules referred to above. And when they are not so prepared, but the decree of the lower Court with all its specifications is simply affirmed by and adopted in the decree of the last appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents. But no question of the correctness of

the contents could be entertained or given effect to by the executing Court. Objections to the decree of the lower Court which has become that of the last appellate Court could be attended to by the latter Court alone. We should therefore say that the decree of the Court of last instance is the only decree susceptible of execution, and that the specifications of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing the decree.

APPELLATE CIVIL.

1882 *April* 3.

Before Mr. Justice Straight and Mr. Justice Oldfield.

LACHMI NARAIN (PLAINTIFF) *v.* BHAWANI DIN (DEFENDANT).*

Act XII of 1881 (*N.-W. P Rent Act*), *ss.* 206,207—*Suit instituted in Revenue Court partly cognizable in Civil Court.*

A co-sharer sued in a Court of Revenue (i) for his share of the profits of a mahal and (ii) for money payable to him for money paid for the defendants on account of Government revenue. An objection was taken in the Court of first instance that the suit, as regards the second claim, was not cognizable in a Court of Revenue. The lower appellate Court allowed the objection, and dismissed the suit as regards such claim on the ground that the Court of first instance had no jurisdiction to try it. *Held* that, the objection being in effect "an objection that the suit was instituted in the wrong Court," within the meaning of ss. 206 and 207 of Act XII of 1881, the defect of jurisdiction was cured by those sections, and the procedure prescribed in s. 207 should have been followed.

THIS was a suit, instituted in the Court of an Assistant Collector of the first class, in which the plaintiff claimed (i) Rs. 218-14-9, being his share of the profits of a certain mahal for 1285 fasli, and (ii) Rs. 252-3-0, being the amount of Government revenue he had paid for the defendants under s. 146 of Act XIX of 1873. The parties were co-sharers in the mahal in question, the defendant Bhawani Din being also the lambardar. The defendant Bhawani Din set up as a defence to the suit, *inter alia*, that the second claim was not cognizable in a Revenue Court, being a claim for money paid for him. The Assistant Collector held that he could take cognizance of such claim; and gave the plaintiff a decree against Bhawani Din for the amount, and for Rs. 17-11-7 profits. On appeal by the defendant the District Court reversed the decree of

* Second Appeal, No. 609 of 1881, from a decree of R. J. Leeds, Esq, Judge of Banda, dated the 21st March, 1881, modifying a decree of Pandit Kanahia Lal, Assistant Collector of the first class, Hamirpur, dated the 19th January, 1881.

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the Assistant Collector, in so far as such claim was concerned, holding, with reference to the case of *Ram Dial* v. *Gulab Singh* (1), that such claim was not cognizable in the Revenue Courts.

The plaintiff appealed to the High Court contending that having regard to the provisions of ss. 206 and 207 of Act XVIII of 1873, the District Court should not have disallowed the second claim.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Mr. *Conlan*, Pandit *Ajudhia Nath*, and Munshi *Sukh Ram*, for the respondent.

The Court (STRAIGHT, J. and OLDFIELD, J.) made the following order remanding the case to the lower appellate Court for the trial of the issue set out in the order:—

OLDFIELD, J.—This was a suit brought in the Revenue Court for recovery of money due as profits, and for money paid by plaintiff on account of revenue due by defendant. It was objected in the Court of first instance that the second part of the claim was not cognizable in the Revenue Court. The Judge in appeal allowed the objection and disallowed this part of the claim on the ground of want of jurisdiction of the Court of first instance to try it.

We are of opinion that the defect of jurisdiction is cured by ss. 206 and 207 of the Rent Act. No doubt in this instance the objection was to a part of the claim in the suit, or in other words it was an objection that the suit in respect of a portion of its subject-matter was instituted in the wrong Court, but we consider that is in effect "an objection that the suit was instituted in the wrong Court" within the meaning of the sections. It is clear that, had the claim for money paid in respect of revenue on account of defendant formed the only subject-matter of the suit, the defect of jurisdiction would be cured by ss. 206 and 207, and it would be anamolous to hold that, by joining this claim with one in respect of which the Revenue Court had jurisdiction, the defect would not be cured, owing to the sections in question not being applicable. The Judge must try the issue in respect of the plaintiff's claim for this item, and we remand the case accordingly and allow ten days for objections being preferred to the finding.

Issue remitted.

(1) I. L. R. 1 All. 26.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1882
April 3.

ABU HASAN (PLAINTIFF) *v.* RAMZAN ALI (DEFENDANT).*

Execution of decree—Sale of "zamindari rights"—Building appurtenant to zamindari rights.

The "rights and interests" of a zamindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property *quâ* zamindar. *Held* that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interests" in the village passed such building to the auction-purchaser. S. A. No. 245 of 1876 (1) followed.

THE plaintiff in this suit claimed possession of a building situate in a village called Hajipur and known as the "*killa*" (fort). He claimed the same as purchaser at an execution-sale in 1873 of the "rights and interests in the village of Hajipur" of Kadir Ali Khan, the proprietor of the village. The defendant had, subsequently to the plaintiff's purchase, caused the building to be attached and proclaimed for sale as the property of Kadir Ali Khan. The plaintiff objected to the attachment, claiming the building by virtue of his purchase in 1873, but his objections were disallowed; and the building was put up for sale in execution of the defendant's decree as the property of Kadir Ali Khan, and was purchased by the defendant. The plaintiff in consequence brought the present suit to recover the building. The principal question in the case was whether the sale of Kadir Ali Khan's "rights and interests in the village of Hajipur" passed the *killa* to the plaintiff. It appeared that Kadir Ali Khan's father had purchased the village, and with it the *killa*, about thirty years before the present suit was brought; and that the *killa* had always been occupied by him and his family as a residence. Both the lower Courts held that the sale of Kadir Ali Khan's "rights and interests" in the village did not pass to the plaintiff his place of residence. In second appeal it was contended on behalf of the plaintiff that the *killa* belonged to Kadir Ali Khan as zamindar, and therefore the sale of his zamindari "rights and interests" passed it to the plaintiff.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

* Second Appeal, No 851 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 2nd February, 1881, affirming a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Moradabad, dated the 30th September, 1880.

(1) Not reported.

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ABU HASAN v. RAMZAN ALI.

The judgment of the Court (STRAIGHT, J., and BRODHURST, J.,) was delivered by

STRAIGHT, J.—We think that the plaintiff-appellant by his purchase at auction acquired the rights of Kadir Ali Khan in the *killa*, which must be taken to have passed in the description "rights and interests in the village of Hajipur." As the building in question would seem to have belonged to Kadir Ali Khan *quâ* zamindar, and as his zamindari rights and interests were brought to sale in 1873 and purchased by the plaintiff-appellant, the presumption is that the *killa* was included, unless there is any thing to show that it was excluded expressly or by implication. As to this there is no evidence, and the plaintiff-appellant now holding the position of zamindar must we think be held entitled to the *killa*. In adopting this view we find we follow a judgment of Pearson and Oldfield, JJ., in S. A. No. 245 of 1876 (1), which has our concurrence. The appeal must be decreed with costs, the decision of the lower Courts reversed, and the plaintiff-appellant's claim decreed.

Appeal allowed.

1882 April 5.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SUKHDEO RAI (JUDGMENT-DEBTOR) *v* SHEO GHULAM AND OTHERS (DECREE-HOLDER AND AUCTION-PURCHASERS.)*

Execution of decree—Sale of "ancestral" land by order of the Court—Act X of 1877 (Civil Procedure Code), ss. 311, 320—Rules prescribed by Local Government under s. 320—Invalidity of sale.

A Subordinate Judge made an order for the sale in execution of a decree of certain immoveable property, which was "ancestral," within the meaning of the Notification by the Local Government No. 671, dated the 30th August, 1880, under which execution of such decree should have been transferred to the Collector; and such property was sold accordingly. *Held* that, the order for the sale of such property having been made without jurisdiction, the sale was void and should be set aside.

CERTAIN land belonging to the judgment-debtor in this case was attached in execution of the decree. The judgment-debtor applied to the Court executing the decree to transfer its execution to the Collector on the ground that the land was "ancestral" within the meaning of the Notification by the Local Government No. 671, dated the 30th August, 1880. He produced as evidence that the land

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* First Appeal, No. 159 of 1881, from an order of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 30th July, 1880.

(1) Not reported.

was "ancestral" the deed of sale under which he had acquired the land bearing date the 4th April, 1845. The Court, by an order dated the 7th March, 1881, made in the absence of the judgment-debtor, rejected the application, holding that the land was not "ancestral," as the judgment-debtor had acquired it by purchase; and directed that it should be put up for sale on the 20th April, 1881. The land was sold accordingly, and the judgment-debtor objected to the sale on the ground that the Court was not competent to order it, the land being "ancestral", and on other grounds affecting the regularity of the conduct of the sale. The Court disallowed the objections, observing that the first did not relate to the publication or conduct of the sale, and moreover had been disposed of by the order of the 7th March, 1881. The judgment-debtor appealed to the High Court, contending that the land was clearly "ancestral," within the meaning of the Government Notification, and the Civil Court had therefore no jurisdiction to sell it, and the sale was *ab initio* void and illegal; and that the order of the 7th March, 1881, could not prejudice him as it was passed *ex parte* in his absence, and such order could not affect the necessity there existed to transfer the execution-proceedings to the Collector.

Munshis *Hanuman Prasad* and *Ram Prasad*, and Babu *Ram Das Chakarbati*, for the appellant.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (STRAIGHT, J., and BRODHURST, J.) was delivered by

STRAIGHT, J.—Only the first two pleas in appeal are relied on by the pleaders for the appellant and judgment-debtor. Their contention is substance is, that when once it was established that the land in question had been owned by their client as proprietor since 1845, in which year it was purchased by him, he was entitled to the benefit of the Notification of the 30th August, 1880, and the Rules prescribed by the Local Government in connection therewith, and that the sale should have been transferred to the Collector, and not have been held by the Court passing the decree. In short we are invited to declare such sale void *ab initio* by reason of the incompetence of the Subordinate Judge to order it, when once it had been proved that the judgment-debtor's property was ancestral within the definition of clause (*a*) of the Notification of the 30th August, 1880. We

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confess ourselves most reluctant to interfere, when we find that no steps were taken by the judgment-debtor to have the order of the Subordinate Judge of the 7th March, 1881, dismissing his objection reviewed. But the appeal before us is from an order confirming a sale, and it is impossible in deciding it, and determining whether the Subordinate Judge was or was not right in making it, to avoid looking into the validity of the sale itself, when it is directly impeached, not for irregularity in the "publishing or conducting," but upon the broad ground that it was bad in its inception, as having been held without jurisdiction in the Court that directed it to make any such order. The words of s. 320 of the Code are clear in the power they give Local Governments to frame notifications and rules thereunder, and the language of the Notification now under consideration is clear and positive. When the judgment-debtor established that he had owned the mahal sought to be brought to sale as proprietor continuously from the 1st January, 1848, the Subordinate Judge had no alternative but to transfer the decree for execution to the Collector, and it was no business of his to consider the mode in which the property had been acquired. Under these circumstances it seems to us that the judgment-debtor's property being, as is now virtually conceded, "ancestral," within the meaning of the Notification, the Subordinate Judge's jurisdiction to order a sale by his Court was ousted, and the sale that he did order cannot consequently be sustained. The appeal will accordingly prevail with costs against the decree-holder, and the sale being set aside, the Subordinate Judge is directed to forward the decree to the Collector for realization by him in accordance with law and the rules prescribed in that behalf. The auction-purchasers respondents will pay their own costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Oldfield.

1882 *April* 15.

IKBAL BEGAM (DEFENDANT) *v.* SHAM SUNDAR (PLAINTIFF).*

Registration—Presentation of document by Agent—Power of attorney not executed and authenticated as required by law—Validity of registration—Act XX of 1866 (*Registration Act*), *ss.* 35 (c), 49, 68, 88.

A document bearing the certificate required by law showing that it has been registered must be treated as a registered document, notwithstanding the registration procedure may have been defective.

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* First Appeal, No. 76 of 1881, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 31st March, 1881.

Held, therefore, where a document bore the certificate required by s. 68 of Act XX of 1866 showing that it had been registered, that, notwithstanding that it had been presented for registration by the agent of the person executing it under a power of attorney not recognizable under that Act for the purposes of s. 34, it must be treated as a registered document. *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1) and *Muhammad Ewaz* v. *Birj Lal* (2) referred to.

A document was presented for registration by the agent of the person executing it authorized by a power of attorney not recognizable under the registration law, and was admitted to registration. *Held* that the person executing such document could not be allowed to object to the validity of its registration by reason of its having been registered under a power of attorney not recognizable under the registration law, such person being herself responsible for the defect in registration. *Har Sahai* v. *Chunni Kuar* (3) followed.

THE plaintiff in this suit claimed to recover certain moneys due on a bond bearing dated the 15th August, 1868, claiming to recover the same from the defendants personally, and by the sale of certain villages hypothecated in the bond, situate in the Moradabad district. The principal defendant, Ikbal Begam, set up as a defence to the suit, *inter alia*, that the bond was not admissible in evidence, as it had not been duly registered, having been registered under a power-of-attorney which was not recognizable for the purposes of the Registration Act. It appeared that the bond was presented for registration to the Registrar of the Moradabad District by one Ghazanfar Ali as attorney of Ikbal Begam. Ghazanfar Ali's power-of-attorney was executed by Ikbal Begam at Rampur in the territory of the Nawab of Rampur. It was dated the 11th January, 1863, and was authenticated on the 23rd January, 1863, in the Registrar's office at Rampur. The Court of first instance held that, assuming that the power-of-attorney was not recognizable for the purposes of the Registration Act of 1866, the Act in force when the bond was registered, yet the bond having been as a matter of fact registered, its registration could not be rendered invalid by any irregularity in the registration proceedings.

The defendant appealed to the High Court, contending again that the bond had not been duly registered, and was therefore not admissible in evidence.

Mr. *Conlan* and Mir *Zahur Husain*, for the appellant.

(1) 15 B. L. R. 228; S. C., L. R. 2 Ind. Ap. 210; 24 W. R. 75.
(2) I. L. R. 1 All. 465.
(3) I. L. R. 4 All. 14.

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Pandit *Bishambhar Nath* and Lala *Harkishen Das*, for the respondent.

The judgment of the Court (STRAIGHT, J., and OLDFIELD, J.), so far as it related to this contention, was as follows:—

OLDFIELD, J.—Ikbal Begam prefers two objections in appeal. The first is that the document which was executed by ladies residing out of British India was not registered by a power-of-attorney prescribed by the Registration Act, and must be in consequence looked on as a document not properly registered and null and void and not admissible in evidence. As to the first objection, the Registration Act XX of 1866 (applicable to the registration of the document in suit) requires that, when the principal is not residing in British India, the power-of-attorney held by the agent, who presents the document for registration, shall have been executed before and authenticated by a notary public or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India. The power-of-attorney in question appears from the endorsement upon it to have been registered in the registration office of Rampur in the territories of the Nawab of Rampur. It may be that this is not a sufficient fulfilment of the requirements of the Registration Act, s. 35, and that the registering officer should not have registered the bond in suit, under such a power-of-attorney; but however this may be, the bond having been certified as duly registered must be treated as a registered document. S. 88 of Act XX of 1866 is to the effect that nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure. In *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (1) their Lordships of the Privy Council held that it was not the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, 36 or other similar provisions of Act XX of 1866, but that it was intended that such errors and defects should be classed under the general words "defect in procedure" in s. 88 of the Act, so that ignorant and innocent persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance; and that case was

(1) 15 B. L. R. 228; S. C., L. R. 2 Ind. Ap. 210; 24 W. R. 75.

referred to and approved in *Muhammad Ewaz* v. *Birj Lal* (1); and they point to a distinction which may reasonably be made between parties and strangers to a deed.

In this case an objection of the nature raised is not one which can properly come from appellant, herself a party to the bond. She admits or at any rate does not dispute execution both of the power-of-attorney and the bond, and that she authorized its registration and acted on it as binding the parties, and it is clear she was herself responsible for any defect in registration. The case of *Har Sahai* v. *Chunni Kuar* (2) decided by this Court is here in point.

We are therefore of opinion that we cannot go behind the certificate of registration and we disallow the first objection.

FULL BENCH.

1882 *April 27.*

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

LAL SINGH AND OTHERS (PLAINTIFFS) *v.* KUNJAN AND OTHERS (DEFENDANTS)*.

Ex-parte decree—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 108, 540.

Held by STUART, C J., and STRAIGHT and TYRRELL, JJ., (OLDFIELD and BRODHURST JJ., dissenting) that a defendant against whom a decree has been passed *ex parte* and who has not adopted the remedy provided by s. 108 of the Civil Procedure Code cannot appeal from such decree under the general provisions of s. 540.

THE plaintiffs in this suit and defendant No. 5 were the proprietors of certain land. Defendants Nos. 1, 2, and 3, were the heirs of one Andi deceased, the occupancy-tenant of such land. Andi before his death mortgaged his holding to defendant No. 4. The plaintiffs claimed in this suit to have this mortgage set aside, on the ground that it had been made without their consent and was consequently illegal, and to recover possession of the land, by ejectment of defendant No. 4, the mortgagee. Defendant No. 4, the mortgagee, alone appeared to defend the suit. He set up as a defence to it that an occupancy-tenant of land in the village in which the land in suit was situate had by village-custom the right to mortgage his holding; and that the mortgage to him by Andi had been made with the consent

* Second Appeal, No. 693 of 1881, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shâhjahânpur, dated the 13th April, 1881, modifying a decree of Maulvi Sayyid Muhammad, Munsif of West Badaun, dated the 25th January, 1881.

(1) I. L. R. 1 All. 465. (2) I. L. R. 4 All. 14.

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of the plaintiffs. The Court of first instance found that the custom set up by defendant No. 4 did not prevail; that the plaintiffs did not consent to the mortgage; and, holding that under these circumstances the mortgage was invalid, gave the plaintiffs a decree as claimed. All the defendants appealed from this decree, on the grounds (i) that the custom whereby an occupancy-tenant was entitled to mortgage his holding without the zamindar's consent, and the consent of the zamindars in this case, was proved; and (ii) that, assuming the mortgage in question was invalid, the plaintiffs were not entitled to a decree ejecting defendants Nos 1, 2, and 3 the occupancy-tenants. The lower appellate Court affirmed the decree of the Court of first instance, directing however, that it should not affect the occupancy-rights of defendants Nos. 1, 2, and 3.

The plaintiffs appealed to the High Court, contending that, as the decree of the Court of first instance had been passed against defendants Nos. 1, 2, 3, and 5 *ex parte*, an appeal did not lie from that decree so far as those defendants were concerned; and the proper course for those defendants was to have proceeded under s. 108 of the Civil Procedure Code. The appeal came for hearing before Brodhurst and Tyrrell, JJ., by whom the following question was referred to the Full Bench:—

"Whether a defendant against whom a decree has been passed *ex parte*, and who has not adopted the remedy provided by s. 108 of the Civil Procedure Code, is, notwithstanding such omission, competent to make an appeal from such *ex parte* decree, under the general provisions of s. 540 of the Civil Procedure Code."

Pandit *Nand Lal*, for the appellants.

The respondents did not appear.

The following judgments were delivered by the Full Bench:—

STRAIGHT, J.—This is a reference by Brodhurst, J. and Tyrrell, J., in which the substantial question to be answered is,—does an appeal lie by a defendant from a decree passed "*ex parte*," under the provision of Chapter VII of the Procedure Code?

Having regard to the decision of Westropp, C. J.,—*Luckmidas Vithaldas* v. *Ebrahim Oosman* (1)—and another of the Madras

(1) I. L. R. 2 Bom. 644

High Court—*Modalatha* (1)—as well as some conflicting rulings of this Court upon the point, among them a judgment of Pearson, J., in which I concurred, in January, 1880, [S. A. No. 734 of 1879 (2)] but which I now believe to be erroneous, I feel bound to examine the point thus raised at some length. In doing so it will be necessary carefully to consider Chapters VI and XLI of the existing Procedure Code, as also to recall the corresponding provisions, if any, of Act VIII of 1859. Before, however, directly adverting to the language of these too Acts, it appears to me essential to a proper appreciation of the question, to ascertain the precise nature of an *ex parte* decree. In the first place its main characteristic is, that it is passed when "the defendant does not appear," that is to say, when he fails to appear at all and answer the process of the Court, though service of it on him has been proved. Upon such default by him, if the plaintiff establishes the *primâ facie* case disclosed in the plaint, he is entitled to his decree, much in the same way as according to English practice judgment would be signed for default in appearance. Under these circumstances, it is obvious that, so far as the record of the Court of first instance is concerned, its contents will be the plaint, any necessary documents that may have been filed by the plaintiff, the formal proof given by him, the judgment and the decree. Issues there can be none, because there has been no traverse by the defendant of the facts alleged in the plaint, and the order of the Court proceeds against him on the presumption that by his absence he admits the cause of action. As an illustration, let me take a suit for possession of immoveable property and mesne profits, on the allegation that the defendant had, on a certain date, dispossessed the plaintiff. The summons, with a copy or concise statement of the matters contained in the plaint, has been served upon the defendant requiring his attendance upon a particular day for settlement of issues, attendance of his witnesses, and disposal of the suit. The appointed day arrives and the plaintiff is present and prepared to prove his case, but the defendant puts in no appearance, either personally or by pleader. Service of the summons being satisfactorily proved, the plaintiff shortly gives evidence of his title, his dispossession from the land in suit by the defendant, and the amount of mesne profits for the period during which he has been kept out of

(1) I. L. R. 2 Mad. 75. (2) Not reported.

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possession, and thereupon he becomes entitled to his *ex parte* decree. It is plain that, under this condition of things, there can be no conflict of law or fact, for the defendant by absenting himself prevents the Court ascertaining what matters, if any, are in issue Now if the contention be sound that he has an immediate appeal from the decree thus passed against him *ex parte*, let us see what the effect will be. Although he has treated the Court of first instance with absolute contempt, and has made no defence either in fact or law, nor caused any issues to be raised and decided, this recalcitrant defendant is to be permitted to go to the appellate Court with the record in the bare state I have indicated, and for the first time to lodge pleas against the plaint, the proof, and decision generally of the first Court. In short, he is virtually to be permitted to fix his own jurisdiction, and to select at his own pleasure the Court to which he will submit the defence he can make to the suit. What is the appellate Court to say to him when he seeks admission of his appeal? It cannot refuse to admit it because he did not appear in the Court below, or did not urge this or that point there, for either the appeal is admissible for all purposes or not at all. So in the result it comes to this, that where an *ex parte* decree has been passed and is appealed, the appellate Court must virtually decide on the merits and the law as a Court of first instance or remand the case under s. 562 of the Code, which it cannot properly do, because the suit has not been disposed of on a preliminary point, or under s. 566 for the trial of issues, which the defendant by his default in appearance in the first Court has never raised. Either his non-appearance in the first Court, until accounted for under s. 108 of the Procedure Code, must be regarded as admitting the validity of the plaintiff's cause of action, and amounting in fact to a confession of judgment, or it has no binding effect on him at all, and he may rip up the whole of a plaintiff's case in appeal, which as an original cause he has never contested. In short, the astounding position is reached, that a defendant who flouts the process of a first Court and wilfully disobeys its summons, is in as good, if not a better, position than a defendant, who appears on the appointed day, submits himself to the jurisdiction, and raises his defence. But I may go further and point out that, in those cases which are open

to second appeal, this defaulting defendant, who has become an appellant in the lower appellate Court, may there allow his appeal to be dismissed for default under s. 556 of the Procedure Code, and then without any application under s. 558 for re-admission go direct to the High Court. How such an appeal could be brought within either of the clauses of s. 584 passes my comprehension, for the dismissal of the appeal by the lower appellate Court has not been passed on any of the grounds therein provided and open to objection, but upon default in appearance. Moreover, is it convenient or equitable that a party should be allowed to present his case for the first time in second appeal? True he is limited to matters of law, but in how many instances is it necessary that certain issues of fact should have been determined in order properly to raise the legal questions? To my mind the principle, apparently enunciated by Kernan, J., in the Madras ruling already mentioned, that a defendant, who wishes to have "the opinion of the High Court" may, so to speak, ignore the subordinate tribunal or tribunals, which the law empowers and directs to try his case, and lie by with any defence he may have to make until it reaches a jurisdiction that meets with his approval, if admitted, must entail the greatest confusion and inconvenience. I cannot bring myself to believe that the Legislature ever for an instant contemplated affording unscrupuluos litigants such extraordinary facilities for keeping alive foundationless claims or resisting just demands. I say foundationless claims, for I do not understand it to be contended that there is any difference between the case of a plaintiff whose suit is dismissed for default, and that of a defendant against whom an *ex parte* decree is passed for non-appearance. I assume that each of them is to be held equally entitled to an immediate appeal. If this be so, then the position only becomes more absurd and untenable. For observe, a plaintiff files his plaint, the summons is issued to the defendant, and the day is fixed for hearing. On that day the defendant attends, but the plaintiff does not, and his suit is at once dismissed. What is there for him to appeal against? Is it his own plaint! Beyond this, the order of the Court dismissing for default, and the decree to the same effect, there is nothing upon the record. But the provision in s. 103 of the Code, " the plaintiff shall be precluded from bringing a fresh

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suit" is to my mind conclusive that the dismissal of a plaintiff's suit for default is to be regarded as a final disposal of it, unles within thirty days he makes an application, and shows good cause why such dismissal should be set aside, and a day appointed for *proceeding* with the hearing. Having regard therefore to the true character of the proceeding of dismissal of a plaintiff's suit for default, and of a decree *ex parte* against a defendant for non-appearance, special provisions as to the setting aside of which are contained in Chapter VII of the Procedure Code, and looking to the title of that Chapter,—"Of the appearance of parties and consequence of non-appearance,"—and to its position in the Code, I can come to no other conclusion than that the Legislature intended those special provisions should be followed by defaulting plaintiffs and defendants. Moreover, it may be remarked that the applications mentioned in ss. 103 and 108, if rejected, are appealable, under s. 588, and that a special limitation period, equivalent in length to that allowed for appealing decrees, is provided for them in arts. 163 and 164, sch. ii of the Limitation Act, 1877. If then the contention is sound that these decrees of dismissal and *ex parte* are appealable, it would seem that a plaintiff or defendant, having lodged his appeal from such a decree by way of precaution, may still pursue his other remedy under ss. 103 or 108, as the case may be, and go on with or abandon his appeal according as his application under these sections is or is not successful. Now, however, let us revert to the Code of 1859, s. 119, in which no doubt is to be found a specific declaration that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance", and it is argued that the absence of this prohibition from the Code of 1877 leaves decrees *ex parte* open to the operation of s. 540. S. 119 of Act VIII of 1859 was a complex and comprehensive one, for not only did it provide that particular judgments were to be non-appealable, but it dealt with the form of application now mentioned in ss. 103 and 108 of the present Code, and made orders passed thereupon final, except when they were made in appealable suits and refused the application, in which case they were appealable. In the draft Bill prepared by Mr. Harrington in 1865, s. 119 was broken up into parts, but the provision at the commence-

ment of that section was embodied in a separate clause, repeating the non-appealability of judgments *ex parte* and of dismissal for non-appearance. In the report of the Select Committee on the Bill of 1875, which subsequently became Act X of 1877, the following occurs with regard to Chapter XXIII of the Bill as to "setting aside decrees by default and *ex parte*." "This Chapter corresponds with ss. 172 to 175 of the Bill of 1865, and s. 119, Act VIII of 1859. Here too we have made no change." But when the Bill itself comes to be looked at in Chapters VII and XXIII, it will be found that as originally drafted by the Committee, the former Chapter is headed "*Of the appearance of the parties and consequence of non appearance*," while the latter is entitled, "*Of setting aside decrees by default and* ex parte." But the prohibition of s. 119 of Act VIII of 1859 is nowhere mentioned. By s. 610 of that draft Bill, orders rejecting applications to set aside decrees by default and *ex parte* were still appealable. In the Act, as subsequently passed, Chapter XXIII before mentioned disappears, but its provisions are to be found imported into Chapter VII, while the limitation originally mentioned in it has, as I have already stated, been carried into arts. 163 and 164, sch. ii of the Limitation Act, 1877. The reason for my calling attention to these circumstances is that it seems impossible to believe that the Legislature ever intended to make so radical a change, as to render *ex parte* decrees and decrees passed on default appealable, without even mentioning the alteration they were effecting, much less without assigning any reasons for their making it. This fortifies me in the conclusion at which I have arrived, namely, that it was no doubt considered that the express provisions of Chapter VII of the Code did, in effect, amount to the prohibition required by s. 540. Incidentally I may remark with regard to the importance, which is sought to be attached to the words of that section, that the only express prohibition to an appeal I can find in the Code is contained in s. 522. I may add, as a fact of some significance, that in the new Rent Act XII of 1881, s. 128, as in the old one of 1873, it is provided that" no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance." It certainly is difficult to understand why in the procedure in civil and revenue suits, which in this respect was at one time identical,

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there should now be, without any explained or intelligible reason, this singular and inexplicable difference. In my judgment, the position of a defaulting plaintiff or non-appearing defendant is, that the former, when his suit has been dismissed upon his failure to attend and support his claim, must apply under s. 103 of the Procedure Code, and the latter, where a decree has been passed *ex parte* against him, under s. 108 to have it set aside, to the first Court, and that such applications, if refused, may be appealed, the right of the plaintiff in this respect being restricted to orders passed in regard to a suit, the decision in which would itself be appealable. If such plaintiff or defendant fail to avail himself of these special provisions of law, then the decree, which is for default and non-appearance, and not passed in reference to the merits of the suit, is by such default and non-appearance remaining unexplained and unaccounted for final, and not subject to the provision of s. 540. I would accordingly answer this reference in the negative.

TYRRELL, J.—I never entertained any doubt on the subject of this reference, and I fully concur in my learned brother Straight's reasonings and conclusion.

OLDFIELD, J.—In my opinion the reply to the reference should be that an appeal will lie from an *ex parte* decree.

S. 540, Act X. of 1877, is to the effect that, "unless when expressly otherwise provided in this Code or by any other law for the time being in force, an appeal shall lie from the decree of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts," and 584 contains a similar provision in respect of appeals from appellate decrees. To my mind there is no doubt as to the meaning of s. 540: it means what the marginal abstract to the section says,—"appeals to lie from all original decrees except when expressly prohibited"—and as there is no express prohibition that an appeal shall not lie from an *ex parte* decree anywhere in the Act or in any other law in force, an appeal necessarily lies.

I presume the contention that an appeal does not lie is based on the ground that the meaning I put on the words of the section quoted is not the meaning they properly bear, or which the Legislature intended they should bear, but that they mean and were

intended by the Legislature to mean that an appeal will lie from decrees, unless when some other procedure is expressly provided for setting aside such decrees; and that this is provided in the case of *ex parte* decrees.

We have of course to ascertain and give effect to the intention of the Legislature, but that intention must be found in the Act itself. We have the law on the subject given expressly in ss. 540 and 584, and we must take those sections to express the intention of the Legislature according to the meaning which the language properly and fairly bears and give effect to it, and the language appears to me susceptible but of the one meaning I ascribe to it, and the marginal note to s. 540 seems to me to show conclusively that that was the meaning which the framers of the section intended it to have, whereas the alternative construction is not the legitimate one, but twists the plain meaning of the words, and requires words to be introduced to support it.

The terms in which s. 540 runs are not new; similar language is to be found in ss. 332 and 372, Act VIII of 1859, and s. 23, Act XXIII of 1861, and the same marginal abstract of the section is given in the margin of s. 332, Act VIII of 1859; and when the Legislature re-enacted the above sections in s. 540, Act X of 1877, while at the same time deliberately omitting from Act X of 1877 the express prohibition of appeal from an *ex parte* decree contained in s. 119, Act VIII of 1859 (and we must assume that what was done was done intentionally and deliberately), I can come to no other conclusion than that it was intended to allow appeals from *ex parte* decrees.

If s. 540, Act X of 1877, is unambiguous and susceptible on a fair construction of its language of but the one meaning given to it in the abstract in the margin, as I contend, we cannot go beyond it, and seek for it another meaning as expressing the intention of the Legislature, on the ground that the latter is more consonant with what we may consider the tendency of other provisions in the Act, or our notions of expediency. While Act VIII of 1859 by its s. 119 expressly prohibited appeals from *ex parte* original decrees, it contained in the portion of the Act referring to procedure in appeals no such provision in respect of *ex parte* appellate decrees,

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and the Calcutta and Bombay High Courts allowed appeals from *ex parte* decrees in cases decided under Act VIII of 1859 (1). It seems to me that, with a knowledge that the Courts had interpreted Act VIII of 1859 to allow of appeals from *ex parte* appellate decrees, if the Legislature had intended not to allow appeals from *ex parte* decrees, when they omitted in Act X of 1877 the express prohibition as to appeals which Act VIII of 1859 contained, they would have taken care to make s. 540 quite clear so as to show that it was intended to allow appeals only when there was no other provision for setting aside the decree, and most certainly they would never have left unaltered the marginal note to s. 540 to the effect—"appeals to lie from all original decrees except when expressly prohibited." I cannot suppose the framers of the Act could have thought that the section as it stands would disallow appeals from *ex parte* decrees after the express prohibition had been omitted from the Act. Whether there may have been any oversight in omitting the prohibition in s. 119 of Act VIII of 1859, or in allowing s. 540 too stand unaltered, is not a question we are concerned with, though I may say that I am not satisfied that there has been any such oversight, nor are we concerned with the question whether it is expedient or proper to permit appeals from *ex parte* decrees.

The decided cases so far as have come to our notice are in favour of allowing an appeal, and proceed on the same construction of s. 540 as I contend for. There is a published decision—*Ramjas* v. *Baij Nath* (2 —and an unpublished decision of this Court—S.A. No. 734 of 1879, decided the 16th January, 1880,—precisely in point. The learned Judges observe: "There can be no doubt that under the new Code of Procedure the appellant in the lower appellate Court was competent to appeal against the judgment of the Court of first instance, even though he had not defended the suit. The terms of s. 540 are conclusive on the point; for no special and express provision of the Code deprives a defendant against whom a decree is passed *ex parte* of the right of appeal." So in a case which came before the Full Bench—*Gulab Singh* v. *Lachman Das* (3)—it was observed: "Under the new Code of Procedure an *ex parte* decree is appealable like any other decree: the provision that no appeal

(1) Broughton's Civil Procedure Code, 1877, p. 674, note to s. 584.

(2) I. L. R. 2 All. 567.

(3) I. L. R, 1 All. 748.

shall lie against an *ex parte* decree has not been re-enacted," and the same view of the law has been taken by the Madras and Bombay Courts. Three decisions of this Court were brought to our notice in which no appeal was allowed. In *Mukhi* v. *Fakir* (1) an appeal from an order made in execution of a decree had been struck off by default by the lower appellate Court. On appeal to the High Court it was held that no appeal lay to the High Court, but this was on the ground that the order of the lower appellate Court was not a decree within the meaning of s. 2 of the Code, and this case does not support the contention that no appeal will lie from an *ex parte* decree. In the other two cases—*Nand Ram* v. *Muhammad Bakhsh* (2); *Kanahi Lal* v. *Naubat Rai* (3)—an appeal had been dismissed for default by the lower appellate Court, and the Division Bench of the High Court would not allow a second appeal, holding that the remedy was by proceeding under s. 558 of the Code. These cases are not precisely in point, but the principle on which the decision rests is no doubt opposed to allowing an appeal from an *ex parte* decree; the current of decisions is however clearly the other way. The answer to the reference should be in the affirmative.

BRODHURST, J.—The question that has, under this reference, to be answered is, whether a defendant against whom a decree has been passed *ex parte*, and who has not applied under s. 108 of the Civil Procedure Code to have that decree set aside, is competent, under s. 540 of the Code, to prefer an appeal against the *ex parte* decree.

In s. 119 of the former Civil Procedure Code, Act VIII of 1859, it was clearly stated that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," but no such provision is to be found in Act X of 1877, and unless a defendant against whom a decree had been passed *ex parte* was entitled under the latter Act to appeal against that decree, he was, until Act X of 1877 was amended by Act XII of 1879, entirely at the mercy of the Court of first instance, for there was then no appeal from an order rejecting an application to have the *ex parte* decree set aside under the provisions of s. 108.

(1) I. L. R., 3 All. 382. (2) I. L. R., 2 All. 616.
(3) I. L. R., 3 All. 519.

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Even if the present Civil Procedure Code allows an appeal against an *ex parte* decree, a defendant, and more specially one who had no answering co-defendant, would incur a great risk, were he to prefer such an appeal without having first taken proceedings to have the *ex parte* decree set aside under s. 108, and probably there have been very few, if any, instances of an appeal from an *ex parte* decree in its full sense, *i.e.*, of an appeal in a case in which there was only one defendant, and he did not appear to defend the suit in the Court of first instance. In the cases out of which this reference has arisen several persons were sued, but only one of them defended the suit, and the Court of first instance, after framing issues and hearing evidence, decreed the entire claim of the plaintiffs in both cases against all of the defendants under the provisions of s. 106, Civil Procedure Code. None of the defendants made any application under s. 108, but all of them preferred appeals, and with these results, that the decisions of the Court of first instance were modified, being affirmed as against the answering defendant, and being reversed in the case of the defendants who had not appeared in the Munsif's Court. The plaintiffs then came to this Court in second appeal, taking the plea "that the decision of the Court of first instance, having been passed *ex parte* as against the defendants (respondents), no appeal could lie from such decree, and the lower appellate Court had no jurisdiction to entertain it; the proper course for the defendants was to proceed under s. 108 of the Code of Civil Procedure."

It would, I believe, generally be more to the advantage of a defendant to make an application to have an *ex parte* decree set aside, under s. 108, rather than, without having adopted that procedure, to have recourse to a regular appeal; but non-appearance in the Court of first instance of one or more defendants does not necessarily show contempt of that Court's authority but, in most cases, as in those that have caused this reference, is probably owing solely to a desire on the part of the non-answering defendants to save themselves from unnecessary expense, and in the belief that the suit has been sufficiently defended for their purposes also by the answering defendant. If a defendant, for these reasons, had not appeared in Court, he could not, if he adhered to the

truth, make an application under the provisions of s. 108, and a defendant who, owing to an understanding with a co-defendant, had not defended the suit and had, contrary to his expectations, had an *ex parte* decree awarded against him, might naturally wish to take the matter before an appellate Court, where he might possibly succeed in his appeal as did the non-answering defendants in the suits before us. With reference to the circumstances of the cases referred to, I am inclined to think that it was probably more convenient to hear all the defendants answering and non-answering together in appeal, rather than to hear an appeal merely from the answering defendant and an application under s. 108 from the other defendants, as the latter procedure might have led to a second appeal from one defendant and to an appeal, under s. 588, from an order passed under s. 108 against the rest of the defendants. It remains to be seen whether under the law now in force a defendant is competent to appeal from an *ex parte* decree. In s. 540, Act X of 1877, it is enacted:—"Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts," and the marginal note to this section, *viz.*, "appeals to lie from all original decrees except when expressly prohibited," is still plainer. The provision that was contained in s. 119, Act VIII of 1859, has not been reproduced in the present Code of Civil Procedure; an appeal from an *ex parte* decree is no longer "expressly prohibited"; and therefore, unless the above-mentioned marginal note, that has been allowed to stand intact for nearly five years, is incorrect, an appeal will certainly lie from an *ex parte* decree. The words of the section itself do not, I think, tend to throw doubt on the correctness of the marginal note, and as it is not "expressly provided" in Act X of 1877, or in any other law in force, that an appeal from an *ex parte* decree shall not lie, it naturally follows that an appeal from such a decree will lie. There is not, I think, anything in the heading of Chapter VII to lead to a different conclusion. The words contained in the heading are, "Of the appearance of the parties and consequence of non-appearance," but what may be the final results of non-

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appearance of one of the parties to a suit in the Court of first instance cannot be foretold, for an application to set aside the dismissal of a suit or an *ex parte* decree may be made, and an appeal against such an order under s. 103 or s. 108 will now lie under s. 588, and the heading and all the sections of the Chapter combined do not show that a regular appeal will not also lie. Moreover, if the words contained in the heading of Chapter VII. carry more weight than I attach to them, they certainly are very far from being as distinct or as forcible as are the words of the marginal note of s. 540; and the Legislature is, I conclude, as responsible for the marginal notes as for the headings of the Chapters, and therefore as an appeal from an *ex parte* decree is not expressly prohibited by the heading or by any other part of Chapter VII, or by any other section either of the Civil Procedure Code or of any other law in force, an appeal from such a decree will, in my opinion, lie.

S. 58 of the Rent Act of 1859, Act X of 1859, contained the provision that "no appeal shall lie from a judgment passed *ex parte* against a defendant," and the same words were to be found in s. 128, Act XVIII of 1873, and are reproduced in the same section of the present Rent Act, XII of 1881. It is not clear why appeals from *ex parte* decrees should be disallowed under the Rent Act, whilst such appeals are permitted under the Code of Civil Procedure, but at the same time it is unintelligible why, if it was intended that there should not be an appeal under the latter Code from an *ex parte* decree, this was not clearly stated, as in Act VIII of 1859, and as in all of the Rent Acts from 1859 up to the present day. Nor why, after having done away with the clear provision of law at the commencement of s. 119 of the former Civil Code, words were admitted into s. 540 and its marginal note which direct that "unless when otherwise expressly provided," or "except when expressly prohibited," an appeal shall lie from all original decrees.

Only one ruling that is exactly in point has been brought to our notice, and that is a judgment of a Bench of this Court (Pearson and Straight, JJ.), in S. A. No. 734 of 1879, decided on the 16th January, 1880. In that case, that was originally decided by the

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Subordinate Judge of Bareilly, there were several defendants, one of whom, Raghu Nath Singh, did not defend the suit, but he together with the answering defendants appealed to the Judge against a decree passed jointly against them all, and the District Judge, who is now one of the Judges of this Court, at the close of his decision remarked:—"Raghu Nath Singh did not contest the case below, but he has joined in this appeal. The appeal is decreed with costs." The first plea taken by the plaintiff in second appeal to this Court was as follows: "The decision is contrary to law in that Raghu Nath Singh the respondent, who did not appear and defend the suit in the Court of first instance, was not competent to prefer an appeal to the lower appellate Court," and this plea was disallowed by the learned Judges above mentioned, who observed: "There can be no doubt that under the new Code of Procedure the appellant in the lower appellate Court was competent to appeal against the judgment of the Court of first instance, even though he had not defended the suit in that Court. The terms of s. 540 are conclusive on this point; for no special and express provision of the Code deprives a defendant against whom a decree is passed *ex parte* of the right of appeal."

Other rulings of this Court and of the High Courts of Madras and Bombay that give strong support to the views above expressed are noted as follows:—*Gulab Singh* v. *Lachman Das* (1); *Ramjas* v. *Baij Nath* (2); *Luckmidas Vithaldas* v. *Ebrahim Oosman* (3); *Modalatha* (4).

Westropp, C. J., in his judgment in the Bombay case here referred to observed: "In the provisions relating to the setting aside of *ex parte* decrees, the new Code of 1877 departs from the provisions contained in the Code of 1859. This latter, by s. 119, expressly prohibited appeals against *ex parte* decrees. The former does not contain any such prohibition; and s. 540 is wide enough to sanction such appeals".

My answer then to this reference is in the affirmative.

STUART, C. J.—The question raised in this reference is really a very simple one of procedure, and I formed at the hearing the opinion that it must be answered in the negative. But before re-

(1) I. L. R. 1 All. 748.
(2) I. L. R. 2 All. 567.
(3) I. L. R. 2 Bom. 644.
(4) I. L. R. 2 Mad. 75.

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cording my views at length I was anxious to know the opinions of the other members of the Court forming the Full Bench, and I have had that advantage, with the result on my mind that the opinion I had formed on the question was right, and I therefore concur in the conclusion arrived at by my colleagues Straight and Tyrrell, JJ. The argument to the contrary is mainly based on a literal and verbal application of s. 540, and takes no account of the inconvenience of such an interpretation of the Code as pointed out in the opinion of Mr. Justice Straight, whose argument has my general concurrence.

But even s. 540 of the Code does not appear to me to support the view that there is an appeal from an *ex parte* decree. That section is the commencement of Chapter XLI of the Code, the heading of which is,—"Of appeals from original decrees"—and then there is a marginal note or reading of the section which appears to state that an "appeal lies from all original decrees except when expressly prohibited." Now in the first place I wish to observe that, even if this marginal addition was a correct reading of the section with which it is printed, it has no legal authority, and is in fact no part of the Act. It is only useful in assisting the reading of this particular section with which it is printed, if that section is open to any doubt as to its true meaning. The present Master of the Rolls in England expressed a *dictum* in a case before him to that effect, but he did not go further, and hold that marginal additions were to be read as incorporated with the express provisions of the Act itself, and to be read with it in all cases. No Judge or any forensic authority could hold otherwise. On the other hand nothing can be more reasonable than to allow such marginal additions to clear up the text of the written law, where such text was in any respect ambiguous. In the present case the marginal addition to s. 540 appears to me unduly to extend the application of the section itself, which in the first place does not provide that an appeal shall lie from all original decrees whatever. The section opens with the very important proviso,—"unless when otherwise expressly provided by this Code or by any other law for the time being in force,"—the true meaning of which it is important to attend to. The proviso does not say

"unless when *an appeal* is otherwise provided," but simply "when otherwise expressly provided," that is, in other words, unless there is any other remedy, and the question therefore at once arises whether there is any other remedy against an *ex parte* decree. Clearly there is such a remedy, and it is supplied by s. 108 of the Code of Procedure; which appears to me to be ample for the purpose, for by this section it is provided that, in the case of a decree *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside, and the section goes on to declare,—"If he satisfies the Court that the summons was not duly served; or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into court, or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit;" and by s. 109 all this is to be done on previous notice in writing to be served on the opposite party—or in other words the party holding the *ex parte* decree. The remedy, however, does not stop here, for by s. 588, sub-section (9), as amended by Act XII of 1879, an order under s. 108 for setting aside a decree *ex parte* may be appealed to the proper Court of appeal whether that Court be the Court of the District Judge or the High Court, all orders in such appeals being final. Now if I am right in holding that such is the remedy within the power and discretion of a defendant in an *ex parte* decree in a suit, there is clearly an end to all argument in favour of the affirmative in the present reference based on the meaning and application of s. 540.

But irrespective of this proviso let us see what are the kinds of decrees contemplated by s. 540? It enacts that "an appeal shall lie from the decrees or any part of the decrees," words which appear to me to point to decrees on the merits of the case in a suit as these have been contentiously adjudicated upon, that is, in other words, decrees determining matters upon which the mind of the Court has been contentiously exercised, and this appears more clearly when the terms of the sections immediately succeeding s. 540 are considered, for the appeal provided by s. 540 shall by s. 541 be in the form thereby prescribed, and "shall be ac-

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companied by a copy of the decree appealed against, and (unless the appellate Court dispenses therewith) *of the judgment on which it is founded.*" The same section goes on to provide that the memorandum of appeal "shall set forth concisely and under distinct heads the *grounds of objection* to the decree appealed against." And by s. 542, the appellant shall not without the leave of the Court be heard in support of any other ground of objection, provided that the Court shall not rest its decision on any ground not set forth by the appellant, *unless the respondent has had sufficient opportunity of contesting the case* on that ground." Now these provisions, which apply both to first and second appeals, appear to me be altogether unintelligible unless they are taken to contemplate a decree with both parties before the Court, or in other words a contentious and not an *ex parte* decree. And if so of course the argument in support of the affirmative in this reference must be disallowed so far as these sections of the Code of Procedure are concerned.

Straight, J., in the details of procedure by which he follows out the various steps of procedure in a suit under the Code shows how impossible it is to hold that there is an appeal against an *ex parte* decree without throwing records into state of utter confusion, and the considerations which he brings to bear on the question before us in the light of the incongruity and inconvenience necessarily occasioned by a different view of the case, ought I think to convince any one open to conviction on reasoning derived from legal experience and a practical knowledge of the course of litigation in this country.

But to my mind there is one simple solution of the question before us. That question arises in a second appeal, and under s. 584 there can be no second appeal *without assignable legal error.* Such error as is explained in s. 584 being first that the decision is contrary to some law or usage having the force of law, second, that the decision had failed to determine some material issue of law or usage having the force of law, or, third, a substantial error or defect in procedure as prescribed by this Code or any other law which may have produced error or defect in the decision of the case on the merits. These are the only grounds on which a second

appeal can be maintained, and it is obvious they can have no application to an *ex parte* decree, which, whatever its defect may be in other respects, is not open to the objection of legal error, since it has been arrived at by the operation of the law itself, as put in motion by a plaintiff against an adversary, who does not even appear to contest his claim, who on the contrary must be taken to have admitted it.

Among the precedents referred to at the hearing was a case decided by Mr. Justice Spankie and myself as a Division Bench,—*Ramjas* v. *Baij Nath* (1). The circumstances of that case, however, are quite different from the present, for there the *ex parte* decree was in an appeal, and not in an original suit, and there is a clear distinction between the two cases. In an appeal there is a record of the proceedings in the original suit itself, and therefore ample material for the appellate Court's adjudication, whether the appeal be a first appeal or second appeal under s. 584 of the Code. I referred to s. 560 (which corresponds to s. 108 for original suits) and I remarked that "the proceeding indeed evidently contemplated by this section is merely an additional privilege or facility given to *respondents*, who may or may not avail themselves of it, but it in no way interferes with respondents in other respects, nor could it have been intended to deprive them of any other rights of procedure to which under the Code they are entitled, such as their right of second appeal under s. 584 of the Code; and there certainly is not the slightest indication in s. 560 of any such intention" And there were besides other reasons which will be found in my judgment for holding that in that case an appeal did lie from the *lower appellate Court's ex parte* order. The present case which relates to an *ex parte* decree in an *original suit* is quite different, the record containing nothing but the plaint, and the unresisted decree thereon, so that as I have already shown there were no materials whatever on which to base a second appeal. My answer to the reference is therefore in the negative.

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(1) I. L. R., 2 All. 567.

P. C.*
1882
January 9.

PRIVY COUNCIL.

HIRA LAL (PLAINTIFF) *v.* GANESH PRASAD AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature for the North-Western Provinces at Allahabad.]

Proof of document—Secondary evidence.

The proprietary right in a taluka was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserved part. Afterwards assignments on both sides took place, and the plaintiff, claiming through the vendor, sued the defendants, who derived title from the vendee, to enforce this liability. The plaintiff alleged, but did not produce, an *ikrar-nama* admitting this agreement between the original parties to the sale The only proof adduced was a judgment in a suit in which this agreement had been held established. The plaintiff's case failed, as it has not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession

In the suit in which that judgment was given, the *ikrar-nama* not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal, inspection of the document having been offered to, and declined by the appellate Court, secondary evidence was admitted.

On this appeal, the error was pointed out of allowing the plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document.

Appeal from a decree of the High Court of the North-Western Provinces (10th July, 1879), affirming a decree of the Subordinate Judge of Allahabad (26th February, 1879), dismissing the appellant's suit with costs.

The question on this appeal was as to the operation of an agreement alleged to have been made upon the sale of zamindari rights in land, part of a taluka, whereby the vendee had undertaken to indemnify the vendors in respect of payments of Government revenue upon certain bighas, part of the same taluka, retained by the vendors; and whether this agreement bound the respondents, as assignees claiming under the vendee. It was contended that notwithstanding the transfers, by the original parties to the agreement, of both the part sold and the part retained, the assignees from the purchaser, who were the present respondents, were bound by the agreement made; and that those who derived title from the

* *Present:*—Sir B. PEACOCK, Sir R. P. COLLIER, Sir B. COUCH and Sir A. HOBHOUSE.

vendors, represented by the appellant, had a right to be thus indemnified.

The land was within the boundaries of taluka Mawaiya, pargana Kewai, in the Allahabad district. This taluka was sold in 1830 by Ghulam Singh and others, zamindars of the taluka, to a vendee who purchased it *be-nami* for the predecessor in title of the present respondents. Disputes followed as to the liability for the malguzari; and the sale-deed was said to contain a condition that the vendors should remain possessed of 1845 bighas, on which the vendee and his representatives were to pay the revenue, as well as that assessed upon their own. It was also alleged that, on the 26th April, 1831, an *ikrar-nama* to this effect was executed between the parties to the sale-deed.

In 1853, as the result of an auction-sale of part of the reserved bighas, Makhan Lal, whom the appellant represented, became possessed of 422 bighas.

On the 5th April, 1875, the Commissioner of Allahabad, in settlement operations, decided that, whatever changes in the proprietorship of these lands might have occurred, no right to permanent exemption from the revenue had been made out, and that liability under s. 83 of Act XIX of 1873 (1) must be enforced. This was confirmed by the Board of Revenue on the 1st September, 1875, and 7th February, 1876.

Thereupon the present suit was brought on the 23rd July, 1878, in the Court of the Subordinate Judge of Allahabad, claiming in effect that the defendants, the owners of the taluka, should pay the revenue assessed on the 422 bighas in the hands of the plaintiff, as heir of Makhan Lal deceased; and that they should be declared liable to pay such revenue without at any time holding the plaintiff liable to repay them. The defence was that the land had not been sold free of revenue in perpetuity, and that the orders then recently made in the settlement department were final.

The issues were, 1st, whether the suit was cognizable in the Civil Courts; 2ndly, whether the alleged agreement could

(1). The North-Western Provinces Land-Revenue Act, 1873, s. 83, enacts that no length of rent-free occupancy of any land, nor any grant of land made by the proprietors, shall release such land from its liability to be charged with the payment of Government revenue.

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be enforced in this manner. The only evidence adduced of the existence of the agreement was a judgment of the Sadr Dewani Adalat of Agra, dated 14th March, 1853, in which it was found, as a fact, that there was a condition in the sale-deed, executed in 1830, whereby the land in that suit referred to (which included the 422 bighas now in question), was to be held free of both rent and revenue in perpetuity.

The Subordinate Judge dismissed the suit as not cognizable by his Court. The High Court, (Spankie and Oldfield, JJ.), on appeal, held that the orders made in the settlement department, assessing the proprietor of the lands, and exempting the defendants who were not the recorded proprietors of the land, were valid and final. But it was held that, on the assumption that there had been made a contract of indemnity binding on the successors in estate of the parties to that contract, a suit might lie in consequence of the acts and omissions of the defendants. However, on the question whether an agreement to this effect had been proved, and could be enforced, (a question stated in the second issue), the Court held that there was nothing to show that the liability for the revenue, undertaken by the vendee, was other than one personal to him. The present defendants were the last of a series of purchasers of the property sold, and their having purchased it did not render them liable for a breach of a condition attached to the first, or original, contract of sale. The decision of 1853 was one in which one Dulhin Begam, through whom the defendants made title, had been held liable; but that decision could not be said to have determined that the possession and ownership of this property carried with it the liability on their part to make good any loss to the successors in estate of the vendors occasioned by revenue assessment (1).

On this appeal,

Mr. *J. Graham*, Q.C., and Mr. *W. A. Raikes*, appeared for the appellant.

Mr. *J. F. Leith*, Q.C., and Mr. *H. Cowell*, for the respondents.

For the appellant it was argued that the agreement of 1830 between vendor and purchaser of the zamindari rights in the taluka, then transferred, created a charge on the vendee, and all those

(1). The judgments will be found reported at page 415 and following pages of vol. II, All. Series, I. L. R.

who derived title under him, to keep indemnified the purchaser, and his successors in estate, in reference to the Government revenue that might be payable at any time on the land, the subject of the agreement. Such an agreement was not affected by the duration of the settlement then current, not having been expressly limited to it. There was some analogy between such a contract, and the English real property law relating to grant of rent charge, and covenant for enjoyment free from taxes; on which subject reference was made to *Packhouse* v. *Middleton* (1) and other cases collected in the note at para. 43 of Chap. XV, s. 1, of Sugden's *Vendors and Purchasers.*

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

SIR ROBERT COLLIER.—This appeal comes before their Lordships under somewhat peculiar circumstances. The case of the plaintiff, who is the appellant, is in substance this: that in October, 1830, three persons, named Sheo Ghulam Singh, Beni Singh, and Mardan Singh, sold a taluka to a person of the name of Ghulam Muhammad, reserving to themselves a certain portion of that taluka, which is differently described as 1,845 bighas, and 1,400 bighas,—in fact, various figures are given describing it,—subject to this condition, that they were to pay no rent for this portion reserved, nor the Government revenue, but that the Government revenue was to be paid by the vendee. They say that by the conditions of the deed of sale, subsequently confirmed by an *ikrar-nama* of April, 1831, this was expressly agreed and stipulated on the part of the vendee. The plaintiff is a purchaser of a part of the reserved portion, deriving title from the original vendors. The defendant is a person to whom one Dulhin Begam, (who was the widow of a person named Ghulam Ahmad, for whom it is alleged that the original vendee purchased *be-nami,*) sold it—it does not appear when.

The plaintiff seeks to establish that the agreement between the original vendor and vendee is binding upon the present defendant, and that he is bound to indemnify him, the plaintiff, for the payment of the Government revenue in respect of the reserved property, or such portion of the reserved property as he possesses.

(1). Cases in Chancery. Temp. Car. II, 173.

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The plaintiff does not put in the original deed,—that is said to have been in the possession of the original defendants,—and he does not give, nor did he ever give, any satisfactory evidence of its contents. He does not put in the *ikrar-nama*, on which he principally relies as setting forth the agreement which has been referred to, and he gives no reason whatever for not producing it. He does not state whether or not it is in his possession; whether he has made any search for it; whether it is lost, nor does he attempt to give any secondary evidence of it, but he relies entirely upon a judgment which was obtained in the year 1853, by the original vendors together with another person, against Dulhin Begam, who has been before spoken of; and he contends that this judgment, without any other evidence whatever, proves his case.

This judgment turns chiefly upon the construction of the *ikrar-nama*. Their Lordships cannot help observing, in passing, on the extraordinary course which appears to have been pursued by the Court of the Sadr Dewani Adalat in that suit. In the Court of first instance, the plaintiff, although he admitted that he had the *ikrar-nama* in his possession, did not produce it, alleging that it had been in the possession of the defendants, and that they might have tampered with it, or had tampered with it. But as he did not produce it, the Judge, (it appears to their Lordships quite properly), held that the secondary evidence of it could not be admitted, and dismissed the suit. When the case came on appeal to the Sadr Court at Agra, it seems that the plaintiff did then produce this document, and offer it for the inspection of the Court. The Court refused to look at it, but admitted secondary evidence of its contents. It appears to their Lordships that the Sadr Court was wrong in that course of proceeding. If the plaintiff had the original and did not produce it in the Court below, his case was not proved, because it rested almost entirely on the *ikrar-nama*, there being no evidence of the contents of the deed of sale; but to accept secondary evidence of the document which was in the plaintiff's custody, without looking at the original, seems to their Lordships to be an extraordinary course. But, be this as it may, the plaintiff is right in contending that this was a suit between the same parties in estate relating in a great degree to the same subject-matter, and in relying

upon it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was "for a declaration of right and proprietary possession, exempt from the payment of the rateable rent (by prohibiting the defendant from demanding the rateable revenue)." And the point decided in the Sadr Court is thus stated :—"The Court, for the above reasons, reverse the decision of the Principal Sadr Amín, and decree in favour of the appellants for possession of the land, exempt from the payment of revenue, and *wasilat* to the amount claimed by them."

It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps be assumed to have had in contemplation when they entered into the agreement, or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Further, it does not appear whether the effect of the judgment is simply to render the defendant, Dulhin Begam, liable to indemnify the plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land, and to bind all persons who may be hereafter in possession of it under any title whatever. Dulhin Begam, it may be observed, as far as their Lordships are able to understand the evidence on this part of the case, which is as obscure as the rest of it, would seem to be, as has been said, the widow of Ghulam Ahmad, the real purchaser, and thus to have been a representative of the purchaser bound by his undertaking; but it would by no means follow that the land is to be bound in whosesoever hands it may hereafter come by purchase or otherwise. The judgment, thus ambiguous, is applied almost wholly to the construction of the *ikrar-nama*, which the Court did not look at. If this *ikrar-nama* had been produced in the present suit, their Lordships might, by applying the judgment to the terms of it, have been able to determine the effect of that judgment; but, in the absence of the *ikrar-nama*, which the plaintiff has not produced, and the non-production of

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which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the plaintiff seeks to have it construed. The more obvious interpretation of it seems to be the more limited one.

Under these circumstances, their Lordships are of opinion that the plaintiff has failed to prove his case; and they will therefore humbly advise Her Majesty that the judgment appealed against be affirmed, and that the appeal be dismissed with costs.

Solicitors for the Appellant: Messrs *Watkins and Lattey.*

Solicitors for the Respondents: Messrs *W. and A. Ranken Ford.*

CIVIL JURISDICTION.

1882 *April* 11.

Before Mr. Justice Straight and Mr. Justice Oldfield.

WAZIR MUHAMMAD KHAN (PLAINTIFF) *v.* GAURI DAT AND ANOTHER (DEFENDANTS).*

Act XII of 1881 (*N-W. P. Rent Act*), *s.* 93 (*g*)—*Suit for arrears of revenue—Jurisdiction.*

Held that a suit against a co-sharer and the transferrees of his share for arrears of Government revenue which became due before such transfer, the plaintiff claiming as lambardar and as heir to the deceased lambardar during whose incumbency such arrears became due, was cognizable in the Revenue Courts. The principle laid down in *Bhikkan Khan* v. *Ratan Kuar* (1) followed.

THIS was a reference under s. 205 of Act XII of 1881 by the Collector of Saháranpur. The Collector stated the case as follows:—

"Wazir Muhammad Khan and others, styling themselves heirs of deceased lambardar Ilahi Bakhsh, and Wazir Muhammad Khan also styling himself lambardar, sued on the 13th September, 1881, Amanat Khan a co-sharer, and two other defendants, auction-purchasers of Amanat Khan's rights in April, 1879, for arrears of revenue on account of kharif 1286 fasli paid by Ilahi Bakhsh when lambardar. Subsequently, saving Wazir Muhammad Khan, the other plaintiffs withdrew their claim, and the plaint stood in Wazir Muhammad Khan's name alone. Wazir Muhammad Khan became

* Misc. No. 12 of 1882.

(1) I. L. R, 1 All. 512.

lambardar in 1881. The year 1286 fasli may be considered as being the agricultural year beginning in July, 1878, and ending in June, 1879. The defendant Amanat Khan did not appear at all. The other two defendants defended the suit on the score that the same was not cognizable under s. 93 (*g*), Act XII of 1881, and even if cognizable, why should they be held liable for Amanat Khan's dues because they had purchased his property. The Tahsildar Assistant Collector decreed the claim against all three defendants.

"The two auction-purchasers, defendants, appeal; the ground in appeal being substantially the same as their defence before the lower Court, save that perhaps it is pleaded now more distinctly than before that the suit is one not cognizable by a Revenue but a Civil Court. It is clear that at the time the arrears of revenue due from Amanat Khan were paid by the then lambardar, the relation of lambardar and co-sharer did not exist between the present plaintiff and Amanat Khan. Any claim therefore that plaintiff can have against Amanat Khan, or the other defendants who have the purchased the latter's rights, for these dues would seem to be rather as heir to Ilahi Bakhsh than in his present capacity as lambardar.

"I can find no precedents exactly to the point at issue. My attention has, however, been drawn to the following decisions—*Mata Deen* v. *Chundee Deen* (1) and *Bhikhan Khan* v. *Ratan Kuar* (2). These two decisions, though not exactly to the point at issue, have some bearing thereon, but such as they are, they are apparently antagonistic to each other. The question therefore as to whether the present suit should not have been instituted in the Civil rather than the Revenue Court is one of considerable difficulty, and involves a point of law which it appears to me is more proper for the decision of a Civil than a Revenue Court."

Pandit *Ajudhia Nath*, for the plaintiff.

Pandit *Bishambhar Nath*, for the defendants.

The Court (STRAIGHT, J., and OLDFIELD, J.) made the following order:—

STRAIGHT, J.—We think that, adopting the principle laid down in the Full Bench decision of this Court in *Bhikhan Khan* v. *Ratan*

(1) N.-W. P. H. C. Rep., 1870, p. 54. (2) I. L. R. 1 All. 512.

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WAZIR MUHAMMAD KHAN v. GAURI DAT.

Kuar (1), the suit with respect to which our opinion is asked was cognizable by the Revenue Court, and was properly entertained by the second class Collector. Such being our view the Collector will proceed to hear and dispose of the appeal preferred to him.

APPELLATE CIVIL.

1882 *April* 20.

Before Mr Justice Straight and Mr. Justice Brodhurst.

RASIK LAL (PLAINTIFF) *v.* GAJRAJ SINGH (DEFENDANT).*

Mortgage by conditional sale—Pre-emption—Limitation—Right to sue—Act XV of 1877 (Limitation Act), sch. ii, No. 120

The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by No. 120, sch. ii of Act XV of 1877, that is to say, six years (*Nath Prasad* v. *Ram Paltan Ram* (2) followed); and where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure has to sue for possession, the right to sue to enforce a right of pre-emption accrues when he obtains a decree for possession.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of a four pies share in a village called Kusmara, which had been transferred to the defendant Gajraj Singh by the defendant Mauji Lal by conditional sale. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Siraj-ud-din* and Pandit *Ajudhia Nath*, for the appellant.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the High Court (STRAIGHT, J. and BRODHURST, J.) was delivered by

STRAIGHT, J.—On the 14th January, 1868, Mauji Lal, defendant No. 2 and uncle of the plaintiff-appellant, executed a conditional sale-deed of a four-pie share of mauza Kusmara to Gajraj Singh, defendant No. 1. On the 29th September, 1873, notice of foreclosure was issued, and the year of grace expired on the 29th September, 1874. On the 28th July, 1879, Gajraj Singh brought a suit

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* Second Appeal, No. 821 of 1881, from a decree of Major T. J. Quin, Deputy Commissioner of Jalaun, dated the 10th May, 1881, reversing a decree of Mirza Jafar Bakht, Extra Assistant Commissioner of Madhoga h, dated the 21st March, 1881.

(1) I. L. R., 1 All. 512. (2) I. L. R., 4 All. 218.

for possession of the four-pie share, on the strength of his foreclosure order, and his claim, having been decreed by the first Court and dismissed by the lower appellate Court, was ultimately decreed by this Court on the 20th May, 1880. This is the date on which the plaintiff-appellant in the present suit alleges his cause of action to have accrued. The case now under consideration was instituted on the 19th January, 1881, the plaintiff's allegation being that he is entitled by right of pre-emption to the four-pie share decreed to Gajraj Singh. The first Court decreed the claim, but the lower appellate Court, holding that the suit should have been brought within one year from the 29th September, 1874, when the year of grace expired, dismissed it.

A Full Bench ruling of this Court—*Nath Prasad* v. *Ram Paltan Ram* (1)—has already decided that art. 10, sch. ii of Act XV of 1877, is inapplicable to transactions of mortgage by conditional sale. In the present case there is nothing to show that Gajraj Singh has obtained physical possession of the four pies, nor indeed, if he had done so, would that make the limitation of one year above referred to any the more apposite, nor do we think that art. 144, as argued by the pleader for the appellant, has any application to the form of suit before us. The limitation must therefore be six years, as provided in art. 120 and the only question to be determined is, when did the plaintiff's right to sue accrue?

The view of the lower appellate Court that the suit should have been brought within one year from the 29th September, 1874, is obviously absurd, as the conditional vendee was out of possession and had to bring a suit for the purpose of obtaining it. It is true that the order of foreclosure, so far as it went, gave Gajraj Singh a title, but until he had it declared by a Civil Court, and possession in virtue of it decreed him, it was not clear, specially as in the present case he was resisted by his mortgagor. It seems to us therefore reasonable to hold that the plaintiff's right to sue accrued to him, when under the decree of this Court the title of Gajraj Singh was established, and he was placed in a position at any moment to obtain possession of the four-pie share in suit by putting his decree for possession into execution. Such being the view

(1) I. L. R., 4 All. 218.

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we take of the matter, the present suit was abundantly in time, and the appeal must be allowed. As the lower appellate Court disposed of the case upon the preliminary point of limitation, it must be remanded for trial on the merits under s. 562 of the Procedure Code. The costs of this appeal will be costs in the cause.

Cause remanded.

1882 *May* 1.

CIVIL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MAKUND LAL (DEFENDANT) *v.* NASIR-UD-DIN (PLAINTIFF).*

Small Cause Court suit—Claim for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1865, *s.* 6.

A suit to recover moveable property attached in execution of a decree and damages for its wrongful attachment, and to set aside the order disallowing an objection to its attachment, is not a suit cognizable in a Court of Small Causes.

THE plaintiff in this suit sued in the Court of Small Causes at Saháranpur for possession of a cart, which the defendant had attached as the property of one Nabi Bakhsh, his judgment-debtor, and damages for its wrongful attachment. He also claimed to have the order disallowing his objection to the attachment of the cart set aside. The defendant set up as a defence to the suit that the cart did not belong to the plaintiff, but to Nabi Bakhsh. The Small Cause Court Judge found that the cart belonged to the plaintiff, and that the plaintiff had not suffered any damage from the attachment of the cart; and accordingly gave the plaintiff a decree for the cart, dismissing the claim for damages.

The defendant applied to the High Court for the revision under s. 622 of the Civil Procedure Code of this decree, on the ground that the suit, being one against a decree-holder to establish a right to property attached in execution of his decree, was not cognizable in a Court of Small Causes.

Babu *Oprokash Chandar Mukarji*, for the defendant.

Pandit *Nand Lal*, for the plaintiff.

* Application, No. 47 of 1882, for revision under 622 of Act X of 1877 of a decree of Maulvi Maqsud Ali Khan, Judge of the Court of Small Causes at Saháranpur, dated the 25th August, 1881.

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The Court (STRAIGHT, J., and BRODHURST, J.) delivered the following judgment :—

STRAIGHT, J.—We think that this petition for revision is a well founded one and should prevail. The suit is not for the possession of personal property, pure and simple, as mentioned in s. 6, Act XI of 1865, but the further relief is prayed that the order in execution disallowing the plaintiff's objection in respect of the property now claimed may be set aside. We do not think the suit was cognizable by the Small Cause Court, and allowing this application with costs, we quash the proceedings therein and direct that the plaint be returned to the plaintiff for presentation to the proper Court.

Order accordingly.

CRIMINAL JURISDICTION.

1882 *May* 4.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* NATHU KHAN.

Forest-offence—Confiscation—High Court, powers of revision under s. 297 of Act X of 1872 (Criminal Procedure Code)—Act VII of 1878 (Forests Act), ss. 54, 56, 58.

No order confiscating forest-produce which is the property of Government in respect of which a forest-offence has been committed is necessary or can be made. All that need be done is to direct a forest officer to take charge of such forest-produce.

An order directing the confiscation of forest-produce not belonging to Government, in respect of which a forest-offence has been committed, can only be made at the time the offender is convicted.

The High Court is competent under s. 297 of Act X of 1872 to revise an order made by a District Judge under s 58 of the Forests Act, 1878, on appeal from the order of a Magistrate made under s 54 of that Act, the jurisdiction of the High Court under s. 297 of Act X of 1872 not being expressly taken away by s. 58 of the Forests Act, 1878.

THIS was an application for revision under s. 297 of the Criminal Procedure Code of an order of Mr. F. Giles, Assistant Superintendent of Dehra Dún, and Magistrate of the first class, dated the 15th July, 1881, and of the order of Mr. R. M. King, Sessions Judge of Sahâranpur, confirming the Magistrate's order. The applicant, it appeared, was entitled under a contract with Government to take the dry timber in certain forests situate in the Dún. Having taken green timber, he was on the 14th May, 1881, convicted by the Assistant Superintendent under s. 25 of the Forests

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Act, 1878, of a forest-offence, and fined Rs 100. The question as to the confiscation of six stacks of wood found in the applicant's possession was ordered to stand over until certain inquiries should be made These stacks consisted of wood which the applicant had lawfully taken under his contract, and of wood which he had unlawfully taken and the taking of which had led to his conviction under s. 25 of the Forests Act. On the 15th July, 1881, the Assistant Superintendent made an order ostensibly under s. 54 of that Act confiscating the stacks. The applicant appealed from this order to the Sessions Judge of Saháranpur, who confirmed it by an order dated the 26th August, 1881.

The grounds on which revision of these orders was sought are fully stated in the order of the High Court. On behalf of Government it was objected that under s. 58 of the Forests Act the order of the Sessions Judge was final, and the High Court was not competent to revise the case.

Mr. *Dillon* and Pandit *Nand Lal*, for the petitioner.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

STRAIGHT, J —This is an application for revision of an order purporting to have been passed by the Magistrate of Dehra under s. 54 of the Forests Act, 1878, on the 15th July, 1881, and subsequently confirmed in appeal by the Judge of Sahárunpur on the 26th August following. It appears that on the 14th May preceding the applicant was convicted by the same Magistrate under s. 25 of the Act for a forest-offence, and was ordered to pay a fine of Rs. 100, or in lieu thereof to undergo simple imprisonment for three months. On that occasion the question of compensation to Government for the loss it had sustained, and as to the confiscation of certain stacks of wood found in possession of the applicant, was ordered to stand over for further inquiries to be made and information to be obtained.

When the present case came on for hearing before me, the Junior Government Pleader, by way of preliminary objection, urged that under s. 58 of the Forests Act the order passed by the Judge in appeal from the decision of the Magistrate was final and not

open to revision under s. 297 of the Criminal Procedure Code. I then intimated, as I now repeat, that I did not think the terms of the section referred to excluded the ordinary revisional powers of this Court over a subordinate tribunal in the exercise of its criminal jurisdiction, where there had been material error in a judicial proceeding. In the absence of any express words to that effect, I must hold that the application now before me has been properly preferred and can be entertained.

Two grounds are taken on behalf of the applicant why the order complained against, which directed the confiscation of certain wood stacks belonging to him, should be quashed. First, that it was not passed at the time of the conviction and fine, but on a subsequent date, when the Magistrate was discharged of the case; secondly, that there is no provision in the Forests Act which authorized the Magistrate to direct the confiscation of the timber, to which the applicant was lawfully entitled, and in respect of which no forest-offence had been committed.

I am of opinion that both these contentions are well-founded and must prevail. With regard to the former of them, it is clear from the second paragraph of s. 54 of the Forests Act that confiscation is to be regarded as matter of punishment, which may be added by way of additional penalty to the imprisonment or fine prescribed for offences. In the present case the offender being known, and before the Court, the Magistrate should either have postponed passing his final order, until the inquiries had been made and the information obtained that he required, or at once have directed confiscation in his judgment of the 14th May. The subseqent proceeding of the 30th May was, I consider, irregular and not authorized by law, and should not have been held. But apart from this, I think that under the Forests Act no confiscation order is necessary, or can be made, in respect of forest-produce which is the property of Government. Ss. 54 and 55 appear to me to place the matter beyond doubt, for in the former the words are "all timber or forest-produce which is not the property of Government, &c.," and in the latter "any forest-produce, if it is the property of Government or has been confiscated." Looking at this language, I can come to no other conclusion than that the Magistrate's order, in so far as it dealt

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with the wood improperly taken from the reserved forest of Timli would have been superfluous, even if made at the time of conviction, as such wood being the property of Government was *de facto* confiscate, and all that he need have done was to have directed that it should be taken charge of by some forest-officer. In saying this I assume that the conviction of the applicant for the substantive offence against s. 25 related to the whole of the wrongfully taken wood found in the six stacks of the applicant. As to the residue, which it was admitted the applicant was entitled to cut under the terms of his contract, the Magistrate's order in respect thereof was altogether indefensible, and could not for a moment be upheld. For it is only to forest-produce, with regard to which an offence has been committed, that power to direct confiscation is given by law. Having regard to the preceding remarks, I have no alternative but to direct that the Magistrate's order of the 15th July, 1881, and that of the Judge of the 26th August following, be quashed.

Orders quashed.

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CIVIL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

MUHAMMAD ALI AND OTHERS (DEFENDANTS). *v.* DEBI DIN RAI (PLAINTIFF)*

Pre-emption—Conditional decree—Question as to whether purchase-money has been paid within time—Act X of 1877 *(Civil Procedure Code), ss.* 214, 244.

The plaintiff in a suit to enforce a right of pre-emption obtained a decree to the effect mentioned in s. 214 of the Civil Procedure Code. On payment by him of the purchase-money into court, the defendants objected, in the execution department, to such payment on the ground that it had not been made within time. The Court which made the decree disallowed the objection. The defendants appealed from the order disallowing the objection. They had previously appealed from the decree The appellate Court heard both appeals together, and holding that the purchase-money had not been paid into court within time, reversed the decree, and allowed the objection. The plaintiff preferred a second appeal to the High Court from the appellate Court's decree, which was admitted. He also preferred an appeal from the appellate order allowing the objection, but this appeal was rejected as being beyond time, and such order became final.

Held that, inasmuch as the question whether the plaintiff had paid the purchase-money into court within time was not one relating to the execution of the decree

* Application, No. 103 of 1881, for review of judgment.

within the meaning of s. 244 of the Civil Procedure Code, but was one which should be decided in the suit itself, and therefore the proceedings in the execution department touching that question were ill-founded, such order was not a bar to the hearing of the second appeal preferred by the plaintiff.

THIS was an application by the respondents in S. A. No. 912 of 1880, decided by Stuart, C. J., and Straight, J., on the 14th June, 1881, for review of judgment (1). The appellant in that case had sued the respondents in the Court of the Munsif of Azamgarh to enforce a right of pre-emption. On the 12th December, 1879, the Munsif gave the appellant a decree declaring that he should obtain possession of the property in suit on payment of the purchase-money within thirty days, but that if such money was not so paid, the suit should stand dismissed. The appellant deposited the purchase-money on the 12th January, 1880. Thereupon the respondents objected in the execution department to the amount being received, on the ground that it had not been deposited within time. The Munsif disallowed this objection, and the respondents appealed from his order to the District Judge. They had already appealed to the District Judge from the Munsif's decree. On the 1st May, 1880, the District Judge heard both appeals together, and holding that the appellant had not deposited the purchase-money within time, reversed both the Munsif's decree and his order made in the execution department disallowing the objection of the respondents to the receipt of the purchase-money. On the 26th August, 1880, the appellant preferred a second appeal to the High Court from the District Judge's decree. On the same day he also preferred a second appeal to the High Court from the District Judge's order made in the execution department. This appeal being beyond time was rejected. The second appeal preferred by the appellant from the District Judge's decree came for hearing before Stuart, C. J. and Straight, J. On the 14th June, 1881, those learned Judges decided that the purchase-money had been deposited within time, and reversed the District Judge's decree, and remanded the case for trial on the merits.

The respondents applied for a review of this judgment on the ground, amongst others, that at the time the judgment

(1) This case (*Debi Din Rai* v. *Muhammad Ali*) is reported at page 850, 3 All. L. R.

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MUHAMMAD ALI v. DEBI DIN RAI.

was passed, the order of the District Judge made in the execution department had become final, by reason that the appeal from it had been rejected.

Mr. *Conlan*, for the respondents.

Pandit *Bishambhar Nath*, for the appellant.

The Court (STUART, C. J., and STRAIGHT, J.) made the following order :

STRAIGHT, J.—The contention of the present applicants for review is that, when the learned Chief Justice and I subsequently disposed of the special appeal on the 14th June, 1881, the order of the Judge passed in execution had, by my refusal to admit the appeal from it, become final. I do not think this argument is a well-founded one. Putting aside any general question as to the power of Courts, by orders on their execution side, to prejudice or affect the rights of parties in a suit to appeal from the substantive decision in the case, the application now before us appears to me to proceed on an unsound basis. The question which was raised on the objection of the applicants in the execution department, as to whether the money ordered to be paid by the Munsif had been deposited in time, was not one arising between the parties in reference to the *execution* of the decree, to which s. 244 of the Code would have any application. On the contrary, it was a substantive question in the suit itself, in which it had been declared that, if the money was not paid upon a particular day, the decree for pre-emption would be extinguished. The words of s. 214 of the Code seem to me to preclude the idea that a matter of this kind in any way relates to the execution of the decree, " the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money the plaintiff shall obtain possession of the property, but that if such money be not so paid, *the suit shall stand dismissed.*" In the present instance I think that any proceedings on the execution side in reference to the decree of the Munsif were ill-founded, and that the question as to whether the money had been deposited in time, bearing directly as it did upon what the final result of the suit should be, was matter for decision in the suit itself, in respect of which pleas in appeal could be urged, and so the present applicants appear to have

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thought, for they made it the ground of their 8th plea in the memorandum of appeal. I therefore do not think that the order passed on the execution side in appeal by the Judge had any effect to bar the learned Chief Justice and myself from hearing the special appeal, nor am I of opinion that our judgment thereon is open to the objections urged in the petition for review. I would dismiss the application with costs; and in this order the Chief Justice concurs.

Application rejected

APPELLATE CIVIL.

1882 *May* 16.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

LLEWHELLIN (DEFENDANT) *v.* CHUNNI LAL AND ANOTHER (PLAINTIFFS)*

Contract for sale and delivery of goods at fixed price—Suit for price—Cause of action —Place of suing—Act X of 1877 (*Civil Procedure Code*), *s.* 17 (*a*)—*Jurisdiction.*

C and *L* entered into an agreement at a place in the Saran district, in which the latter resided and carried on business, whereby *C* promised to sell and deliver to *L* at a place in the Saran district certain goods, and *L* promised to pay for such goods on delivery "by approved draft on Calcutta or Cawnpore (where *C* carried on business) payable thirty days after the receipt of the goods or by Government currency notes." *C* delivered the goods according to his promise, but *L* did not pay for the same, and *C* therefore sued *L* for the price of the goods, suing him at Cawnpore.

Held that the "cause of action," within the meaning of s. 17 of the Civil Procedure Code, was *L's* breach of his promise to pay for the goods; that the parties intended that payment should be made at Cawnpore and the cause of action therefore arose there; and that therefore the suit had been properly instituted there.

THE plaintiffs in this suit, who carried on business at Cawnpore under the style of Bihari Lal, stated in their plaint that on the 22nd November, 1877, at Sonepur fair, they sold to the defendant 500 maunds of indigo-seed at the rate of Rs. 9 a maund, agreeing to deliver the same on the 15th February, 1878, and to pay commission at the rate of Rs. 5 per cent; that they delivered the indigo-seed to the defendant on the stipulated date; that the defendant promised to give them a bill of exchange for Rs. 4,275, the price of the seed, after deducting Rs. 225, his commission, on his Cawnpore or Calcutta firm, payable to the plaintiffs' firm at Cawnpore,

* First Appeal, No. 85 of 1881, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 11th May, 1881.

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thirty days after the delivery of the seed; that the defendant did not send the bill of exchange for the price of the seed; and that the price of the seed became payable on the 17th March, 1878, at Cawnpore, and the cause of action arose on that date at Cawnpore. They accordingly claimed to recover the price of the seed and interest. The suit was instituted in the Court of the Subordinate Judge of Cawnpore. The defendant set up as a defence to the suit, *inter alia*, that as the sale of the indigo-seed took place at Sonepur, in the district of Saran, and he was dwelling and carrying on business at Ramgola, in the same district, and had not made any promise to pay the price of the seed at Cawnpore, the suit was not cognizable in the Court of the Subordinate Judge of Cawnpore. The Subordinate Judge held, as to the question of jurisdiction, that the plaintiffs were at liberty to institute the suit either at Cawnpore or Calcatta, and he therefore had jurisdiction to entertain the suit; and he gave the plaintiffs a decree.

The defendant appealed to the High Court, contending, *inter alia*, that the Subordinate Judge of Cawnpore had no jurisdiction to entertain the suit, as the cause of action had not arisen at Cawnpore, and the defendant did not dwell or carry on business within his jurisdiction.

Mr. *Amir-ud-din*, for the appellant.

Pandit *Nand Lal*, for the respondents.

The judgments of the Court (STRAIGHT, J., and BRODHURST, J.), so far as they related to this contention, were as follows:

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Cawnpore passed on the 11th May, 1881. The plaintiffs-respondents are merchants and bankers carrying on their business in that city, under the style or firm of Bihari Lal, and the defendant-appellant is the proprietor of an indigo concern at Ramgola in the district of Saran in the Presidency of Bengal. On the 22nd November, 1877, some of the plaintiffs and the defendant appear to have met at Sonepur fair, also in the Saran district, and there a contract was entered into, by which the plaintiffs agreed to deliver to the defendant at Satta Ghat on or before the 15th February, 1878, 500 maunds of indigo-seed at Rs. 9 per maund. The

plaintiffs were to allow the defendant a commission of five per cent., and payment was to be made by him by approved draft on Cawnpore or Calcutta, at thirty days date from receipt of goods, or by Government currency notes. The 500 maunds were duly delivered, and this the defendant does not deny, but he neither remitted a draft on Cawnpore or Calcutta, nor currency notes, nor did he pay for the same, though he on more than one occasion promised to do so. The plaintiffs accordingly on the 18th February, 1881, instituted the present suit for the recovery of Rs. 4,275 principal and Rs. 1,492 interest, total Rs. 5,767. The Subordinate Judge decreed the claim in full with costs and future interest, and the defendant now appeals, his first and most substantial plea going to the jurisdiction of the Subordinate Judge of Cawnpore to entertain the suit of the plaintiffs in his Court.

At the hearing I was strongly disposed to favour this contention, having present to my mind numerous English decisions in which it had been ruled that the expression "cause of action," in connection with the question of jurisdiction, means whole cause of action, that is to say refers not only to the "*locus in quo*" the breach has taken place, but includes the place where the contract itself was entered into. Upon looking into the authorities however and carefully considering the question, I have come to the conclusion my first impression was erroneous, and that the term "cause of action" as used in s. 17 of the Procedure Code comprehends material portion of the cause of action. A contract as we know necessarily involves mutual obligations, the failure to perform each and all of which by the parties interested respectively may create a right to sue. In the present instance for example, the plaintiffs were to deliver the 500 maunds of fresh and clean up-country indigo-seed at Satta Ghat, on or before the 15th February, 1878. If they had failed to make such delivery, the defendant might have sued them in the Court of the District in which Satta Ghat is situate, or in Cawnpore where the plaintiffs carry on their business, for damages for the breach of their contract, or to enforce its specific performance. So if the defendant had refused to accept delivery on the ground of the indigo-seed not being of the quality agreed, the plaintiffs might in their turn have sued him in the same Court for

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damages for such non-acceptance, or to compel him to perform his contract to accept. But as a matter of fact, neither of these causes of action has in itself arisen, because the plaintiffs did deliver the seed as promised, and so wholly discharged their share of the obligation under the contract, and the defendant partially performed his portion by accepting the delivery. In respect of these two matters, therefore, there was no ground for complaint upon either side, and all that remained was for the defendant to make payment in the manner agreed upon, and this he failed to do. Such failure I think must be taken to constitute the immediate and material cause of action, as being the only substantial incident to the contract remaining unperformed. The sole question that remains is, where was payment to be made? Looking to the ordinary course of commercial relations, I think the intention of the parties was that such payment should be made at the plaintiffs' place of business at Cawnpore, and that neither draft nor currency notes having been delivered there, the breach upon which the suit is brought occurred within the jurisdiction of the Subordinate Judge, and he was competent to entertain the claim. In coming to this conclusion I am fortified by two rulings of this Court, one that of a Full Bench—*Prem Shook* v. *Bheekhoo* (1); and F.A. No. 137 of 1869, Morgan C. J., and Ross, J. (2)—also by *Gopikrishna Gossami* v. *Nilkomul Banerjee* (3), and *Hills* v. *Clark* (4).

BRODHURST, J.—The appellant's pleas are not, I think, sustainable. Under the provisions of s. 17, Act X of 1877, it was optional with the plaintiffs to institute the suit either in the Court of the Subordinate Judge at Chapra in the district of Saran, or in the Court of the Subordinate Judge of Cawnpore. They might have sued in the Chapra Court because the defendant was at the time residing in that district, and they might have instituted their suit in the Cawnpore Court because the cause of action arose within the jurisdiction of that Court, owing to the defendant's not having paid, on the stipulated date, the amount that he undoubtedly was bound to pay to the plaintiffs at Cawnpore, either by an approved draft on that place or on Calcutta or by means of Government currency notes.

(1) N.-W. P. H. C. R., 1868, p. 242
(2) Unreported
(3) 13 B. L. R. 461
(4) 14 B. L. R. 367

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Admittedly the principal sum claimed has been due since the 17th March, 1878, or for more than four years, and if, as contended by the defendant-appellant, the plaintiffs were compelled under the law to institute the suit in the Court at Chapra, at a distance of more than three hundred miles from their place of business, a great hardship would under the circumstances have been inflicted upon them.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1882 *May* 16.

NAWAL SINGH (PLAINTIFF) *v.* BHAGWAN SINGH AND ANOTHER (DEFENDANTS.)*

Hindu law—Mitakshara—Partition—Right of son born after partition to father's property.

The property acquired by a Hindu governed by the law of the Mitakshara after a partition has taken place between him and his sons devolves on his death, when he leaves a son born after partition, on such son, to the exclusion of the other sons.

THE plaintiff in this suit, one of the sons of one Chatar Singh, deceased, by his first wife, sued the defendant, the son of Chatar Singh by his second wife, for possession of certain land, claiming by right of inheritance under Hindu law. The defendant set up as a defence to the suit that the land in question had been acquired by his father Chatar Singh after he and his sons by his first wife had partitioned the ancestral property of the family, and before he had married his second wife; and that Chatar Singh had made a verbal gift of the land to him and had placed him in possession. The Court of first instance decided that the family property had not been partitioned, and gave the plaintiff a decree. The lower appellate Court found that a partition of the family property had taken place, and held that the plaintiff had no right to property which his father had acquired after the partition, but that the defendant was entitled to succeed to such property. It accordingly dismissed the plaintiff's suit.

The plaintiff having appealed to the High Court, the Court (STRAIGHT and TYRRELL, JJ.), by an order dated the 28th January, 1882, remanded the case to the lower appellate Court for the trial

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* Second Appeal, No. 701 of 1881, from a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 18th April, 1881, reversing a decree of Maulvi Mubarak-ul-lah Khan, Munsif of Jalesar, dated the 18th December, 1880.

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of the issue whether Chatar Singh had made a gift of the land in suit to the defendant. The lower appellate Court decided that Chatar Singh had not done so. On the case being returned to the High Court the defendant contended that the gift to him of the land in suit by his father Chatar Singh was proved; and that, assuming that such gift was not proved, the plaintiff had no right under Hindu law to the land in suit.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—The findings on remand have been returned to us, and we proceed to dispose of the appeal. Objections have been filed by the respondent, under s. 567 of the Procedure Code, and it is conceded that the first of these has no force. The second, however, raises a question of Hindu law, for the purpose of determining which it is necessary to recapitulate a few facts, that, we may add, are admitted on both sides. Chatar Singh had three sons by his first wife, Nawal Singh the plaintiff, Bhagwan Singh the guardian of the minor defendant, and Niladhar who died childless in the lifetime of his father. Prior to his death, however, partition had taken place between Chatar Singh and his three sons, and each of them had entered into separate enjoyment of his divided share of the ancestral estate. Subsequent to such partition, Chatar Singh married a second wife, by whom was born to him the minor defendant. Chatar Singh, after the separation from his three sons, acquired by inheritance from one Ratan Singh the 4 bighas, 6 biswas, 6 biswansis of muafi land part of which is claimed by the plaintiff in the present suit. After the demise of Chatar Singh, the plaintiff asserted a right by inheritance to his share of this 4 bighas, 6 biswas, 6 biswansis, and it is on this basis he now comes into Court. At first sight his contention appears to be plausible enough, as, although he would have no right to inherit any portion of the ancestral property allotted to, and taken by, his father upon partition, yet he and his brothers would, under ordinary circumstances, be entitled as heirs

to participate equally in the self-acquired estate left by the father. But in the present case a contingency has intruded itself that alters the whole aspect of matters. We refer to the second marriage of Chatar Singh, and the birth of the minor defendant subsequent to his father's separation from his three half-brothers. Now it is obvious that, unless the partition can be re-opened,—which it cannot, "for a son born after partition has no claim on the wealth of his brothers" —or some equivalent for the share he would have been entitled to had he been alive at the time of partition can be found, the minor respondent would be placed at a great disadvantage, for having lost his personal share in the ancestral property by reason of the partition having taken place before his birth, he would still only get a proportionate part of the self-acquired estate of his father. This condition of things, however, is distinctly provided for by the Mitakshara, ch. i, s. vi, v. 122:—"When the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution," and distribution is explained as meaning "the allotments of the father and mother after death," with the reservation that he will only take the mother's portion, should she leave no daughters surviving her. The same principle is enunciated by Manu: "A son born after division shall alone take the parental wealth," that is, what appertains to both father and mother. Vrihaspati upon this point also observes: "All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition; those born before it are declared to have no right". We likewise find this subject fully discussed at pp. 92 and 93 of the Vira-Mitrodaya by Gopalchandra Sarkar, where all the authorities are reviewed; and as far as we can see they endorse to the full this principle of Vrihaspati, and the rule of inheritance laid down by the Mitakshara as already quoted. Applying the law thus clearly enunciated to the present case, the minor defendant has a distinct right to the 4 bighas, 6 biswas, 6 biswansis, to the exclusion of the plaintiff, whose suit accordingly fails and must be dismissed. The appeal must also be dismissed with costs.

Appeal dismissed.

1882
April 1.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BAGHELIN (DEFENDANT) *v.* MATHURA PRASAD (PLAINTIFF) *

Mortgage—Lease of mortgaged property by mortgagee to mortgagor—Jurisdiction of Revenue Court—Remedies of mortgagee under mortgage—Act X of 1877 *(Civil Procedure Code), s.* 561—*Time for filing objections—Holiday.*

Where the time for filing objections under s. 561 of the Civil Procedure Code expired on a day when the Court was closed, and objections were filed on the day the Court re-opened, *held* that such objections were filed within time.

On the 16th March, 1874, *L* gave *M* a mortgage on certain land for Rs. 24,000 for a term of ten years, by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of interest; that the mortgagee should grant a lease of the land to the mortgagor, the latter paying the former the profits of the land every harvest in lieu of interest; that, if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage, and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease and to enter on the land, and collect the rents thereof, and apply the same to payment of interest. On the 21st March, 1874, *M* gave *L* a lease of the land, under which Rs. 1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879 *M*, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land, but was successfully resisted by *L's* widow.

On the 16th January, 1880, *M* sued *L's* widow for interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage to the date of suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits.

Held that the mortgage and lease transactions must be regarded as one and indivisible and the questions at issue between the parties be dealt with *quâ* mortgagor and mortgagee; that, so regarding such transactions and dealing with such questions, *M* and *L* did not stand in the position of "landholder" and "tenant," and the proceedings of 1879 in the Revenue Courts were had without jurisdiction; also that, although, looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should in the first place seek possession of the land, yet as *M* had never obtained possession, but on the contrary had been resisted when he sought to obtain it, his present claim for interest was maintainable.

The Court directed that so much of the interest as was due at *L's* death should be recoverable from such property of his as had come into his widow's hands; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally.

* First Appeal, No. 118 of 1880, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th June, 1880.

THE plaintiff in this suit claimed to recover interest on Rs. 24,000, from the 16th March, 1874, to the 15th January, 1880, at the rate of one rupee per cent. per mensem, from the defendant personally, and by the sale of a ten biswas share in a village called Asoli, an entire village called Gadhiya, and a thirteen biswas share of a village called Chintaman. He founded the suit on an instrument, dated the 16th March, 1874, executed in his favour by one Lalman Singh, the deceased husband of the defendant. This instrument, after reciting that Lalman Singh was indebted to the plaintiff in a sum of Rs. 23,000, and that he had borrowed a further sum of Rs. 1,000 from him, which made the whole sum due by him to the plaintiff Rs. 24,000, and that he had not the means to pay such debt, stated as follows:—"I do therefore.....in consideration of the said sum mortgage for a term of ten years my zamindari property, that is to say, ten biswas of Asoli, the entire twenty biswas of Gadhiya, and thirteen biswas of Chintaman: I shall have mutation of names effected in the Revenue Court, and until mutation takes place the mortgagee shall have no claim against me for interest, nor shall I have any claim against him for profits: I have made over the profits of the mortgaged property to the mortgagee in lieu of interest: it has been further stipulated that a separate lease shall be granted to the mortgagor on condition that he shall continue to pay the profits on account of the lease to the mortgagee every harvest, and if the lease-money is not paid at the end of any year, I shall pay interest at one rupee per cent. per mensem on the whole mortgage-money from the date of the execution of this deed: in that case the mortgagee shall have no claim to the profits of the mortgaged property; he shall only be entitled to interest; and the money received from the lessee (mortgagor) shall be credited to the payment of interest: and if the money is not paid for a year, the mortgagee shall also have the power at the end of the year to set aside the lease and enter upon the mortgaged property himself, collect the rents thereof, and apply the same, after deducting village expenses, towards the payment of interest; should there be any deficiency in the amount of interest, I, the mortgagor, shall pay the same to the mortgagee at the end of the year with interest thereon at one rupee per cent. per mensem; on my failure to do so, the mortgagee shall be at liberty to realize the same in any way he may

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think best: whenever the lease is set aside, whether for failure to pay interest or for any other reason, I shall pay the mortgagee whatever may be due on account of Government revenue or interest; should I fail to do so, the mortgagee shall be at liberty to realize the same as he may think best, with interest at one rupee per cent. per mensem: if in the month of Jaith, within the stipulated period, the mortgagor pays off the money, redemption shall take place: if during the period the mortgagee holds possession of the property the gross rental diminishes or anything remains due from tenants, I shall make the same good when I pay the mortgage-money."

On the 21st March, 1874, the plaintiff gave Lalman Singh the lease of the mortgaged property referred to in the instrument of mortgage. This lease was for a term of ten years, and it provided that the mortgagor should pay the mortgagee Rs. 1,980 annually as profits; and that "should the lessee fail to pay the above at every season, he should pay the whole amount of the profits at the end of the year, and should he fail to pay at the end of any year, the lessors (mortgagees) should have power to cancel the lease."

On the 16th January, 1880, the plaintiff instituted the present suit against the widow of Lalman Singh. He alleged that Lalman Singh had not paid him the profits of the lease, nor had the defendant paid them; that he had dispossessed the defendant under the terms of the mortgage, but the Revenue Court had maintained her possession; and that the defendant represented that the lease was a nominal one, and interest had been paid regularly, and he had therefore become entitled to enforce the terms of the mortgage and to claim interest. He claimed interest on the principal amount of the mortgage, Rs. 24,000, from the 16th March, 1874, to the 15th January, 1880, at the rate of twelve per cent. per annum, asking for a decree against the defendant personally, and for the sale of the property. The defendant set up as a defence to the suit, *inter alia*, that the plaintiff could, under the terms of the mortgage, sue for possession of the property, but he could not sue for interest only. The Court of first instance held that the plaintiff was entitled to sue for interest, the agreement to pay him the profits of the property having been broken, and gave him a decree.

The defendant appealed to the High Court, contending, *inter alia*, that the plaintiff had no cause of action for the suit; that he was not entitled to sue for interest under the terms of the mortgage; and that the interest was not enforceable against the property, as the property was not hypothecated for its payment.

Mr. *Hill*, Munshi *Hanuman Prasad*, Lala *Lalta Prasad*, and Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Mainpuri, passed upon the 29th June, 1880. On the 16th January, 1880, the plaintiff-respondent brought the present suit for recovery of Rs. 15,990, arrears of interest alleged to be due and owing from the defendant-appellant, for herself, and as widow and heiress of one Lalman Singh, deceased, mortgagor to the plaintiff, under a deed of mortgage, dated the 16th March, 1874, by sale of the property mortgaged. The defendant, in substance, pleaded that concurrently with such mortgage a lease of the mortgaged property was granted by the plaintiff mortgagee to her deceased husband, who was to receive and pay over the profits in lieu of interest; that after his death she succeeded him in possession of the property as lessee; that from 1874 the profits had been annually paid over, first, by Lalman Singh, and subsequently by the defendant, to the plaintiff, and that at the time of institution of the suit nothing was due; that the case should have been brought in the Revenue Court; that the plaintiff is not entitled to claim interest, but should have sued for possession. The Subordinate Judge decreed the claim to the extent of Rs. 14,905 against the defendant, the hypothecated property, and the estate left by Lalman Singh. The defendant appeals to this Court, the main contentions urged for her being (i) that the suit is badly framed and no cause of action is disclosed; under the terms of the mortgage-deed the plaintiff should have sued for possession and damages for being kept out of possession; (ii) that the interest is not enforceable against the property which was only mortgaged to cover the principal sum advanced; (iii) that even assuming the

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uit to be properly framed the recovery of a considerable portion of the amount decreed is barred by limitation. Objections were filed by the respondent under s. 561 of the Procedure Code against the Subordinate Judge's disallowance of the plaintiff's claim to the extent of Rs 35, but it was urged by the appellant's counsel that they were put in too late and could not be entertained. We have looked into the matter and we find that the 21st December, 1880, was the date fixed for the hearing of the appeal, and the objections should accordingly have been filed not later than the 14th December preceding. But the Court was closed for the Muharram vacation from the 6th December to the 18th, both dates inclusive. The 19th being a Sunday, business did not commence till Monday the 20th, and we therefore think that the petition of objections was in time.

It is unnecessary to detail the facts at any length. It appears that in March, 1874, Lalman Singh, the defendant's deceased husband was indebted to Mathura Prasad in the sum of Rs. 23,000. He obtained the loan of a further sum of Rs. 1,000 in cash, and thereupon executed a mortgage for Rs. 24,000, in favour of his lender, of certain properties belonging to him, for a term of ten years. In lieu of the mortgagee taking possession, a lease was to be granted by him to the mortgagor for the term of ten years, and the mortgagor was to pay over the profits in satisfaction of the interest to the mortgagee. In accordance with this provision of the mortgage, a lease was executed on the 21st March, 1874, and Rs. 1,980 was the sum agreed to be annually paid as profits in lieu of interest. The plaintiff now asserts that such profits were never paid by Lalman Singh down to the date of his death, nor have they been by his widow since, and he estimates his claim to Rs. 15,955 on the basis of interest at the rate of one rupee per cent. on Rs. 24,000 from the 16th March, 1874, to the 15th January, 1880, pursuant to the following conditions of the mortgage-deed:—"I have made over the profits of the mortgaged property to the mortgagee in lieu of interest. It has further been stipulated that a separate lease will be granted to the mortgagor on condition that he shall continue to pay the profits on account of the lease to the mortgagee every harvest, and if the lease-money is not paid at the end of any year, I shall pay interest at one rupee per cent. per men-

sem on the whole mortgage-money from the date of the execution of this deed. In that case the mortgagee shall have no claim to the profits of the mortgaged property: he will only be entitled to interest, and the money received from the lessee shall be credited to the payment of interest. And if the money is not paid for a year, the mortgagee shall also have the power at the end of the year to set aside the lease, and enter upon the mortgaged property himself, collect rents thereof and apply the same, after deducting the village expenses, towards the payment of interest. Should there be any deficiency in the amount of interest, I, the mortgagor, shall pay the same to the mortgagee at the end of the year with interest thereon at one rupee per cent. per mensem. On my failure to do so, the mortgagee will be at liberty to realize the same in the way he thinks best." The plaintiff asserts that he dispossessed the defendant under the above condition as to entry into the mortgaged property, on default in payment of the profits as stipulated, and there is a petition on the record filed by him on the 5th September, 1879, in the Court of the Collector, declaring that he has cancelled the lease and taken the property under "his direct management," and praying that receipts for the revenue shortly to be collected may not be given without his (the plaintiff's) signature, and that the tenants be instructed to pay the revenue without demur. Subsequently, on the 9th September, 1879, the Deputy Collector passed an order as prayed on the petition, and later on, the 20th October, directed the ejectment of the defendant, telling her, if she had any objection to offer to her ejectment, she must assert it by a regular suit. This decision of the Deputy Collector was appealed to the Collector on the 10th November, 1879, and an order was passed by him maintaining the possession of the defendant under the lease.

Looking at these facts, we think it abundantly clear that, when the plaintiff sought to enforce the second condition of his mortgage by cancelment of the lease and entry upon the property mortgaged, he was obstructed by the defendant, and the question then arises, whether this conduct upon her part affords the plaintiff a cause of action in respect of the earlier condition as to the payment of interest, and entitles him to bring the present suit. We think that the mortgage and lease transactions must be regarded as one and indi-

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visible, and that the mere use of the term lease in reference to the mortgagor does not alter his real character or qualify the proprietary rights that continued in him. In fact, in dealing with the questions raised in the case, they can only be decided *quâ* mortgagor and mortgagee. That there was no charge on the land for the interest, we are quite clear, and the contrary view of the Subordinate Judge in this respect cannot be sustained. The transaction between the parties appears to have been primarily one of simple mortgage, the mortgagor continuing in possession and paying over the profits in lieu of interest, with the proviso that, if the profits remained unpaid for one year, the mortgagee might enter upon the property mortgaged, and realize them himself. The other alternative was given him of recovering interest from the mortgagor on the whole sum advanced from the date of the mortgage at the rate of one per cent. Under these circumstances it seems to us that the plaintiff and Lalman Singh did not stand in the position of "landholder" and "tenant" within the meaning of Act XVIII. of 1873, and that the plaintiff's application to the Revenue Court in September, 1879, was accordingly a useless and abortive proceeding, as made to a tribunal that had no jurisdiction to entertain it. Now it seems to us evident from the terms of the contract of the 16th March, 1874, that it was the intention of the parties that, on default being made for one year by the mortgagor in paying over the amount of profits agreed upon, possession of the mortgaged property should be primarily sought by the mortgagee. In other words, he was to assume the position of an ordinary usufructuary mortgagee in possession, entitled to satisfy his interest from the income of the property. It is odd, to say the least of it, that though Lalman Singh had failed to pay over the profits as fixed from the very outset, no effort should have been made by the plaintiff to enforce the condition of his mortgage as to cancelment of the lease and obtaining possession until as late as 1879, and that then he should have gone into the wrong Court. The fact, however, remains, that he never did have possession: on the contrary he has, by the action of the defendant, been prevented from getting it, nor has he been paid any portion of the profits as agreed either by Lalman Singh or the defendant. Under such circumstances we are not prepared to say that there is no cause of action for the present suit,

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or that the plaintiff is debarred from reverting to the condition in the mortgage contract as to the payment of increased interest, and from bringing a suit in the present shape to recover it. Looking at the matter broadly, we think the equitable order to pass will be to sustain the finding of the Subordinate Judge as to the amount of interest due, and to direct that so much of it as had accrued and was owing at the date of Lalman Singh's death shall be realized from such property of his as has come to the hands of the defendant. With regard to the residue, which relates to the period during which the defendant herself has been in possession of the mortgaged property and in receipt of the profits, that will be decreed against her personally. In either case interest will be allowed at the rate of 12 per cent. from the date of the institution of the suit to realization. The respective amounts due from the defendant, as in possession of her husband's estate, and personally, will be determined in the execution department. To the extent we have indicated, the appeal will be decreed, the objections of the respondent disallowed, and the decision of the Subordinate Judge modified. Having regard to the delay on the part of the plaintiff to enforce the conditions of the mortgage in respect of interest, and the defendant's dishonest plea of payment, which we agree with the Subordinate Judge she has wholly failed to establish, we order that the parties pay their own costs in each Court.

Decree modified.

ORIGINAL CIVIL.

1882
April 20.

Before Mr. Justice Straight.

HARRISON AND ANOTHER (PLAINTIFFS) *v.* THE DELHI AND LONDON BANK AND ANOTHER (DEFENDANTS).*

Partnership—Winding-up—Account—Suit for dissolution—Transfer of suit—Act IX of 1872 *(Contract Act), s.* 265—*Act X of* 1877 *(Civil Procedure Code), ss.* 25, 215—*Parties to suit—Act XV of* 1877 *(Limitation Act), sch.* ii, *Nos.* 106, 120—*Power of partner to mortgage partnership land—Power of partner to borrow money.*

T, B, R, and *W,* the owners of a certain estate in equal shares, in 1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864 *H, E,* and *I,* joined the firm. In 1870 *H* died; and in 1871 *T* purchased his share and those of *E* and *I,* and in 1873 of *R.* In 1875 *T* gave the Delhi and

* Original Suit No. 1 of 1881.

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London Bank a mortgage on such estate as security for the repayment of money which he had borrowed from the Bank ostensibly for the purposes of the estate. The Bank obtained a decree against him personally for the money, in execution of which his rights and interests in the estate were put up for sale on the 20th June, 1877, and were purchased by the Bank, which obtained possession of the estate in August 1877. In August 1879 *B* and *W's* executor sued *T* and the Bank, claiming a declaration that they were or had been partners with *T* in the estate, that if the partnership should be held to be subsisting, it might be dissolved, or that if it had ceased to exist, the date of its termination might be fixed; and that in either event a liquidator might be appointed to take an account, and after realizing assets and discharging liabilities, might be ordered to pay them each one-third of such balance as remained. The suit was instituted in the Court of a District Judge. He transferred it to the Court of a Subordinate Judge. The High Court subsequently transferred it to its own file.

Held that the suit was not one falling within the purview of s. 265 of the Contract Act; but assuming that it was such a suit, and the Subordinate Judge had no jurisdiction, the High Court was nevertheless competent to transfer it.

That the Bank, as *T's* representative by purchase, had been properly joined as a defendant in the suit.

That the period of limitation applicable to the suit was that provided in No. 120, and not No. 106, Act XV of 1877; but that in either case the suit was within time, as the partnership was dissolved, and consequently time began to run, not from the death of *H*, or the purchases by *T* of his share or those of *E* and *I* in 1871, or of *R* in 1873, but in August 1877, when the defendant Bank took possession of the partnership property.

That, as the effect of the purchases by *T* in 1871 and 1873 was to relieve the estates of *H*, *E*, *I*, and *R* of all past and future liabilities of the partnership, in respect of which *B* and *W* still continued as liable as *T*, and to which they would have to contribute to discharge, such purchases should be regarded and treated as made on behalf of the partnership, and therefore at the time of the execution of the mortgage of the estate *B*, *W*, and *T* were interested in the estate to the extent of one-third each.

That, although *T* was not authorized, either actually or impliedly, by *B* and *W* to mortgage the estate, and the mortgage therefore was not binding on them, yet as they allowed him to conduct the business of the estate in such a manner as to make it appear that the control and management of it rested with him, and he was for all ordinary business purposes their representative, *B* and *W* were bound, in any accounting that might take place, to recoup the defendant Bank for such advances as were made to *T* for the necessary purposes of the estate, in the same proportion as they must discharge debts due to other creditors.

That *T* was entitled to be reimbursed such moneys of his own as he had expended within the legitimate scope and for the proper purposes of the partnership as originally contemplated by the parties.

Directions to the liquidator appointed how to proceed.

THIS was a suit which was instituted in the Court of the District Judge of Saháranpur, and by him transferred to the Court of the

Subordinate Judge of Saháranpur. It was then transferred by the High Court to its own Court and tried by Straight J., sitting in the exercise of the extraordinary original civil jurisdiction of the High Court.

The facts of the case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Messrs. *Howard* and *Hill*, for the plaintiffs.

Mr. *Ross* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the defendants.

STRAIGHT, J.—In this suit Francis Claud Burnett, by Samuel Black, and Charles William Ingleby Harrison, executor of the estate of James Williamson, deceased, are the plaintiffs, and John Bulkely Thelwall and the Delhi and London Bank, Limited, are the defendants. The relief prayed by the plaint is, that the accounts of a partnership, in which the said Francis Claud Burnett and James Williamson are alleged to have been jointly interested with the said John Bulkely Thelwall, may be taken; that a liquidator may be apponted to wind up the affairs of the said partnership, and after realization of the assets and satisfaction of the liabilities of the same by sale of the properties of the said partnership, the partners may severally be decreed in the proportion of one-third each of what remains. No written answer to the plaint was put in by the defendant Thelwall, but he appeared and gave evidence at the hearing of the cause, which may be found set out at length in the record. On behalf of the defendant Bank a lengthened statement was filed, the main contentions in which substantially came to this: (i) that no suit for an account can lie against the Bank; (ii) that the dissolution of the said partnership having occurred in the year 1870, and the present suit not having been instituted till the month of August, 1879, it was barred by limitation; (iii) that the defendant Thelwall was the sole proprietor of the Markham Grant Estate, and that the deeds of partnership set up by the plaintiffs, not having been registered, conveyed no interest in the land to the plaintiffs, and could have no priority in face of the registered mortgages held by the Bank; (iv) that at the time of the mortgage to the Bank the defendant Thelwall had by purchase, or by contract for pur-

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chase, become sole owner of the whole of the properties mortgaged; (v) that even if the plaintiffs had an equitable interest in the properties mortgaged by Thelwall, it could not hold good against the defendant Bank, which parted with its money in good faith without notice of such equitable interest; (vi) that in the event of the defendant Bank being held liable to an account, allowance should be made for all the sums obtained from the Bank and expended by the defendant Thelwall upon the Markham Grant Estate, to the date when the Bank obtained possession under its decree, and subsequently for all sums of money expended by the Bank while in possession of the property for its maintenance and improvement.

Before proceeding to set out the issues, which were settled after hearing counsel on both sides, as raising all the questions in difference between the parties, it may be convenient to give a broad outline of some of the general and undisputed facts of the case in order to render those issues intelligible.

Somewhere about the year 1860 the defendant Thelwall, who was then a Major in the army, having rendered good service to Government during the Mutiny, preferred an application for a grant of land, which he asked to have made in the name of his son. The authorities, however, objected to conferring a grant in the manner proposed, though quite willing to do so to Thelwall in his own name, and ultimately upon the 27th November, 1862, a formal warrant was executed, by which a tract of waste land measuring 2,946 acres 3 roods, situate in the Dehra Dún, was allotted to Thelwall upon certain terms and conditions. These in substance were, that if in five years a specified portion of the land had not been cleared and brought into cultivation, so much of it as was not cultivated was to be at the disposal of Government. There was a like provision, that so much more was to be cleared and cultivated in ten years and in twenty years, otherwise a like proportionate forfeiture. If no commencement was made to clear the lands granted by the second year after such grant, they were to be resumable by Government. A certain yearly *jama* to be paid by the grantee was also fixed, and it was provided that the cultivated portion of the grant, whatever that might be from time to time, should be considered an estate paying revenue to Government. Prior to the

date of this grant, Mrs. Thelwall, the wife of the defendant Thelwall, and a Mrs. Raikes, the wife of a gentleman whose name will presently be frequently mentioned, by a deed of the 2nd September, 1861, had acquired the half of the mahal situated in Dehra Dún and known as Lachiwala. By another deed of the 18th July, 1862, the plaintiff Burnett, Williamson, who was then alive, Raikes mentioned immediately above, and the defendant Thelwall, purchased another mahal in the Dún called Hanswala; and subsequently to the grant by Government of the 27th November, 1862, they also acquired by two deeds, both of the 13th May, 1863, two other mahals respectively called Ghisapuri and Duiwala. The second half of Lachiwala was conveyed to Raikes by a deed of 3rd November, 1861. The condition of things in the year 1863 therefore appears to have been this, that the defendant Thelwall was the owner under certain conditions of the property assigned to him by Government, and which for convenience sake may be called the Markham Grant proper, and he was part owner of three villages, Hanswala, Ghisapuri, and Duiwala, in conjunction with Burnett, Willamson, and Raikes. With regard to Lachiwala, that would seem to have belonged partly to Thelwall and partly to Raikes, though, as I have already shown, the second half of it was not acquired till November, 1861. Although the written grant was not actually given until November, 1862, it would appear that Thelwall was let into possession of the land to which it related as early as 1860. Shortly after the formal grant was made to him, being ordered away on active service, he left Raikes, a personal friend of his, who was at that time a Major in the Indian army, to look after the property, giving him a share in it as an inducement, on his (Raikes') undertaking to pay half the expenses of getting it into working order. This arrangement seems to have subsisted for only a short period, and then Burnett, the plaintiff, joined the enterprise under circumstances similar to those of Raikes. Still later, but not very long after this, Williamson, who was a Captain in the Staff Corps, communicated with Thelwall and invited him to give him a share in the grant, and reference having been made to Burnett and Raikes, it was agreed to let him in into the concern upon payment of a *bonus* of Rs. 3,000. This money was duly found by Williamson and was handed over to the

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defendant Thelwall. It may be taken that at the time of the purchases of the several mahals hereinbefore mentioned, all or some of these persons—Raikes, Burnett, and Williamson—were jointly interested in the Markham Grant with Thelwall and were recognized by him—to use the words of his subsequent mortgage to the defendant Bank—as "the proprietors of the said Markham Grant." It will be observed that from 1861 until the commencement of 1863, no document had been drawn up to record the terms upon which the relations between the parties were subsisting, and accordingly on the 7th March, 1863, a deed of partnership was executed between Thelwall, Burnett, Raikes, and Williamson, in which it was recited that the four persons above named "are joint proprietors in equal shares of the estate known as the Markham Grant, situate in the Dehra Dún, containing upwards of 5,000 acres, upon which two tea plantations have been formed, and which stands in the name of the said John Bulkely Thelwall, in trust for himself and the other parties hereto, in equal shares, as the said John Bulkely Thelwall doth hereby acknowledge and declare." It was further agreed by the said Thelwall, Burnett, Raikes, and Williamson, that they should be co-partners for the purpose of cultivating tea and other products upon the said estate upon terms, which in substance were as follows: *first*, that they should receive profits and incur liabilities in equal shares or in proportion to the shares they might at any time hold, and should contribute money for the purposes of the Company in manner provided by the deed; *second*, that there should be a paid manager, to be chosen by the partners; *third*, that on request by such manager each partner should provide funds not exceeding Rs. 1,600 per mensem, unless otherwise agreed, the amount required to be fixed by the manager and four months' notice of the call to be made; *fourth*, upon two months' default in payment of any call, interest to be payable at the rate of 24 per cent. per annum until call paid; *fifth*, the shares of the partners to be liable for all money due by the partnership, and no sale of his share to be made by a partner while any debts remained due; *sixth*, no share of a defaulting partner to be sold at the instance of the Company until he has been in default for a period of twelve months after notice of the intention to bring his share to sale; *seventh*, the defaulting partner shall be

liable for any balance remaining due after realization of the value of his share; *eight*, debts to the partnership by any partner to be deducted from any dividends that might become payable to him; *ninth*, proper accounts to be kept and to be open to the inspection of all the partners; *tenth*, half-yearly statements of accounts to be prepared by the manager and to be supplied to each partner. The three next provisions are not material, but clause *fourteenth* provides that if any of the partners shall die during the continuance of the partnership, such death shall not operate as a dissolution as regards remaining partners, and the executors or administrators of the partners so dying, or any person that may be appointed by the last will and testament of the parties so dying, to succeed to his share in the estate of the co-partnership, and shall have the option of carrying on the business and concern in co-partnership with the surviving partner or partners; *fifteenth*, partners to have the right of pre-emption to shares in the partnership; *sixteenth*, sets out the course to be adopted upon a resolution to dissolve the partnership; *seventeenth*, no partner to mortgage his share without the consent of the rest; *eighteenth*, any pledge of his share by a partner to be intimated to the manager and registered, otherwise such pledge to be void. Such in substance were the terms of the deed of partnership of the 7th March, 1863, under which Thelwall, Raikes, Burnett, and Williamson respectively became interested in the partnership relating to the Markham Grant.

Subsequently to the execution of this instrument it was found impossible satisfactorily to work the property owing to want of capital, and it became necessary to look to other quarters for pecuniary assistance. Three gentlemen, named Theobald, Wheler, and Bishop, were ultimately found and induced to embark in the speculation. They made preliminary advances to the extent of Rs. 4,000, and subsequently, on the 9th April, 1864, a second deed of partnership, incorporating in terms the provisions of that of the 7th March, 1863, was executed between the former original partners, Thelwall, Raikes, Burnett, and Williamson, and Theobald, Wheler, and Bishop, by which these three last mentioned persons were created partners to the extent of a moiety of the partnership property, upon the undertaking to advance for the purpose of th

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outlay of the estate to the amount of Rs. 30,000 by monthly instalments, and after payment of this sum had been made they were to contribute, in conjunction with the other four partners, to the expenses of the partnership rateably in proportion to their shares. After the execution of this second deed a Mr. Palmer was appointed manager of the property, under the superintendence of Theobald; but in the year 1866, it having been found matter of great difficulty to work the grant, a lease was given to Palmer, as the defendant Thelwall alleges without his knowledge or sanction, and by virtue of this Palmer entered into occupation of the property in the character of lessee. It does not appear that any visit was paid to the estate by Thelwall from 1862, when he left it in charge of Raikes, until 1869, when he found Palmer in occupation, though he asserts that he did not even then learn that the position of this person in regard to the property was that of a lessee. I may remark here, that at the time of this visit or thereabouts a very singular transaction, somewhat inconsistent with Thelwall's assertions, took place between him and Palmer, which in effect came to this, that a portion of the grant was leased by Palmer to Thelwall at a nominal rent, in order that the latter might try some experiments in China grass growing. In 1870 Theobald died, and in the early part of 1871 Thelwall, who had obtained two years' leave, returned to the Markham Grant and proceeded at once to oust Palmer, taking possession of the entire property, buildings, stock-in-trade, in short of everything, and assumed the sole control and management. In June of that year he obtained from the defendant Bank the first loan of Rs. 10,000, as is alleged, for the working of the grant, and from that date down to the end of April, 1875, in the course of a variety of transactions, he increased his indebtedness to the sum of Rs. 1,37,778. Upon the 31st May, 1875, a further loan of Rs. 3,275 having been added to this amount, Thelwall executed a mortgage to the defendant Bank of the Markham Grant, together with the four mahals hereinbefore enumerated. Upon the same date he also made another mortgage to the Bank for Rs. 20,000, charging his Colonel's allowances and the crops and produce thereafter to be derived from the above-mentioned properties. On the 20th September, 1876, the defendant Bank instituted a suit against the defendant Thelwall to recover Rs. 1,91,647-14-2 and to

establish its right to bring to sale that estate known as the "Markham Grant," situate in the Eastern Dún, consisting of the original grant and various mahals subsequently added to it, in execution of decree. It was objected by the Subordinate Judge, that, as the mortgage-deed of the 31st May, 1875, showed that there were partners in the property with Thelwall, in the persons of Burnett and Williamson, they should have been joined as parties to the suit. To this the pleader for the Bank rejoined that he wholly denied that they were partners, and if they ever had been, they had long before disposed of any interests they possessed to Thelwall. On the 28th September, 1876, the Subordinate Judge passed an order to the effect, that if the plaintiff would consent to a decree for the sale of the interest of Thelwall alone in the Markham Grant Estate, Burnett and Williamson need not be joined, otherwise he would have to make them parties. To this the counsel for the defendant Thelwall did not assent, maintaining that as the suit had been instituted with full knowledge that Burnett and Williamson were partners, the Bank ought not to be permitted to obtain a decree against Thelwall only, and its suit as brought should be dismissed. The pleader for the Bank, however, having assented to the suggestion of the Subordinate Judge, a simple money-decree was passed in favour of the Bank, and after one sale had taken place, which was set aside on the ground of some irregularity, the right, title and interest of Thelwall was disposed of by public auction on the 20th June, 1877, and bought by the defendant Bank for Rs. 5. On the 7th August following the defendant Bank obtained possession of the whole of the Markham Grant, together with the mahals pertaining thereto, which possession it still retains.

On the 11th August, 1879, the present suit was instituted in the Court of the Judge of Saháranpur, and the 24th September was fixed for the settlement of issues. On the 14th October, 1879, a proceeding is recorded by the Judge, from which it appears he was of opinion that the suit was not of the kind to which s. 265 of the Contract Act was applicable. He therefore remitted the case to the Subordinate Judge of Dehra for disposal. When the matter came before the Subordinate Judge on the 17th October, a question was raised as to his jurisdiction to entertain the suit under the order

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of the Judge, who, it was argued, had no power under s. 25 of the Procedure Code to direct the transfer. Both the counsel for the plaintiff and the pleader for the Bank appear to have agreed that the case was not cognizable by the Subordinate Judge, and in this view the Subordinate Judge himself seems to have concurred. An adjournment was granted for the purpose of allowing an application to be made either to the District Judge to re-transfer the case to his own file, or to this Court to remove the suit and dispose of it in the exercise of its extraordinary original jurisdiction. The plaintiff elected to take the latter course, and on the 29th November, 1879, a petition was put in before me, sitting in single bench, to remove the cause to the original side of this Court. I granted a rule, and directed that notices should issue to the Bank and Thelwall to show cause why it should not be made absolute. On the 19th February, 1880, counsel appeared on behalf of the Bank and opposed the transfer on various grounds, which at this moment need not be recapitualated. I, however, was of opinion that, as the suit was of considerable magnitude and involved nice questions of law, it was a fit one to be tried by the High Court in the exercise of its extraordinary original jurisdiction, and I accordingly made the order prayed. Owing to the prolonged illness of the defendant Thelwall, which rendered it impossible for him to give evidence, and the length of time that was necessarily occupied by the counsel on either side in examining the multitudinous and voluminous letters and documents bearing on the case, settlement of issues could not be made until the 17th January, 1881. Upon that date counsel for all the parties attended, and after a lengthened discussion the following issues were fixed :—

1*st.*—Has this Court jurisdiction to entertain this suit?

2*nd.*—Having regard to the relations between the parties, can a suit for an account be maintained against the defendant Bank?

3*rd.*—Is the suit barred by limitation ?

4*th.*—At the time of the execution of the two deeds of partnership of the 7th March, 1863, and the 9th April, 1864, did the Markham Grant Estate vest in the partnership, so as to create a joint and several proprietary interest in each member, with respect to such property?

5th.—What was the precise nature of the interest acquired by the defendant Bank, in their purchase at the execution-sale of June, 1877, and what effect had such purchase upon their position as mortgagees under the deed of the 31st May, 1875?

6th.—At what date, and how, if at all, has the partnership been dissolved?

7th.—At the time of the execution of the deed of the 31st May, 1875, what was the precise nature and extent of the interest in the Markham Grant Estate possessed by the defendant Thelwall?

8th.—Was the defendant Thelwall, when he borrowed the money from the defendant Bank, actually or impliedly authorized to do so on behalf of the partnership, and did the other members of the partnership by their conduct allow him to appear, and so lead other persons to believe him, their responsible manager and authorized representative, to conduct all business on their behalf in respect of the Markham Grant Estate, and to contract for them?

9th.—If the last issue is answered in the affirmative, did the defendant Bank, in their transactions with him prior to 1875, act upon such belief?

10th.—Assuming that accounts should be taken, is the defendant Bank entitled to be allowed for the money advanced to the defendant Thelwall, and the various sums from time to time expended, either through him or by the Bank directly, in and about the Markham Grant Estate; and if yes, in what proportion should the plaintiffs contribute?

11th.—Upon the assumption that accounts should be taken, is the defendant Thelwall entitled to a contribution from the plaintiffs in respect of all moneys expended by him upon the Markham Grant Estate, and if so, to what extent and in what proportions should the plaintiffs contribute?

In reference to the point raised by the first of these issues, it was in substance objected by the counsel for the Bank, that at the time the application was made for the removal of the suit into this Court, it had been improperly transferred by the District Judge to the Court of the Subordinate Judge, and was therefore irregularly

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before a tribunal that had no jurisdiction to try it. He accordingly contended that there was no suit pending in the sense of s. 25 of the Procedure Code. I do not feel pressed by this argument. If the suit fell strictly within the terms of s. 265 of the Contract Act, as being an application to wind up the business of a partnership after its termination, it was properly cognizable by the District Judge and rightly instituted in his Court. If it did not, it was still something very much more than a mere claim for a declaration of partnership right, and might be considered as praying for the additional relief mentioned in s. 215 of the Procedure Code. Under any circumstances, it appears to me that there was a "suit being or falling within the jurisdiction" either of the Judge or the Subordinate Judge, and I therefore think it was competent for me under the 9th article of our Charter to remove such suit for trial and determination in this Court. But apart from this view of the matter, an examination of the provisions of s. 265 of the Contract Act shows, that as a condition precedent to resort being had to them, a partnership must not only be admitted to have existed, but such partnership must also have terminated. Further than this, the proceeding apparently contemplated by that section is more in the nature of an application than a formal suit. In the present case, however, the allegation by the plaintiffs of a partnership between themselves and Thelwall, as regards the lands now in possession of the defendant Bank, is directly challenged and traversed, and though the relief asked is not so shaped in terms, I think it must be taken to be for a declaration, that Burnett and Williamson are or were partners with Thelwall in the Markham Grant Estate and its appurtenant mahals; that if such partnership is held to be still subsisting, it may be dissolved, or that if it has ceased to exist, the date of its termination may be fixed: and in either event, that a liquidator may be appointed to take an account, and after realizing assets and discharging liabilities, may be ordered to pay to the plaintiffs a proportion of one-third each from such balance as remains. Under these circumstances, I do not think that the suit was strictly of the kind contemplated by s. 265 of the Contract Act, so as to be exclusively entertainable in the Court of the District Judge. On the contrary, I consider it was cognizable by the Subordinate Judge and might have proceeded to

trial before him. The Judge's order remitting the case to the Subordinate Judge was perhaps somewhat irregular, and would have been more correctly passed under s. 57 of the Procedure Code. But I am altogether indisposed to pay serious attention to a matter of such pure technicality, or to throw out the suit upon any such ground as that raised in the first issue. I think the plea as to the jurisdiction accordingly fails, and that the case was rightly removed into, and has been properly heard by, this Court.

The point raised by the second issue is, whether, looking to the terms of the plaint and the relief specifically sought, the Bank can be properly joined as a defendant to the suit? That there was a partnership between Williamson, Burnett, and Thelwall is a point about which, it seems to me, there can be little doubt; indeed, so far as the latter is concerned, the fact is now conceded. The deeds of the 7th March, 1863, and the 9th April, 1864, both of which I hold to be good and admissible evidence, as also the recitals in the defendant Bank's mortgage of the 31st May, 1875, together with the letters and documents put in on the one side or the other, appear to place this matter beyond the region of controversy or contradiction. If there were not all this proof, it would be scarcely possible to suppose that any of the gentlemen who associated themselves with Thelwall in 1863 and 1864 would have advanced substantial sums of money, as they undoubtedly did, by way of a speculation, on the chance of obtaining what they must have known would be long-deferred profits, without first assuring themselves, that they had some tangible security for the hard cash they were investing in the shape of an interest in the lands, the improvement and development of which they were contributing towards. Looking at all the oral and documentary proof, I can come to no other conclusion than that there was a partnership in the land of the Markham Grant and the appu-tenant mahals, in which, with the others, whose names it is not necessary to enumerate, Williamson, Burnett, and Thelwall were members, and I find accordingly. In considering the issue now more immediately before me, it is not necessary to stop and inquire into the precise nature of the loan transactions, which took place between Thelwall and the defendant Bank from 1871 down to 1875. Whether they were actually effected by Thelwall on behalf of the partnership, with the

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express or implied assent of Burnett and Williamson, or were purely personal transactions upon his own responsibility—questions which must hereafter be fully discussed—this is clear, that the Bank now being in possession of the whole of the property belonging to what was once, if it is not now, a subsisting partnership, must have a direct interest in the taking of any accounts between the plaintiffs and Thelwall. Apart from the mère question of account, moreover, the Bank has, upon the face of its own statement of defence, a vital and direct interest in the suit, as it not only controverts the partnership in the land asserted by the plaintiffs, but—assuming such partnership to be established—asserts the right of Thelwall to mortgage the partnership estate. Whatever that may amount to, we know the Bank bought at the sale in execution of its decree on the 20th June, 1877, only the right, title, and interest of Thelwall in the Markham Grant and appurtenant mahals: and as I have already found that these lands were the property of the partnership, of which Williamson, Burnett, and Thelwall, were members, the defendant Bank, standing as it does in the shoes of Thelwall, is under like liabilities and obligations, and may be called upon to account in the same manner as he might have been. I therefore think that, apart from the questions as to the partnership in the land, and the authority of Thelwall to mortgage, the suit, so far only as it prays an account, can be maintained against the Bank, which has rightly been made a party. The second issue must therefore be decided in favour of the plaintiffs.

With reference to the third issue, I do not consider that No. 106, sch. ii of Act XV of 1877 is applicable to the present form of the suit, the wider scope of which I have already considered and discussed at length, and need not again enter into. But even assuming it to be so, I think the plaintiffs are abundantly in time. In the first place I do not hold the death of Theobald to have put an end to the partnership. The terms of clause 14 of the partnership deed of 1863, which was incorporated in that of 1864, seem to me to preclude this contention, and what is still more significant is that none of the other parties ever regarded the decease of that gentleman as effecting a dissolution. Nor do I consider that the purchase by Thelwall of the shares of Theobald, Wheler, and Bishop in 1871, and of Raikes in 1873, was "*de facto*" productive

of a like result. I find no clause in the partnership deed providing for any such contingency or making any such declaration, and while I think that, under clause 15, Williamson and Burnett should have been afforded an opportunity, if they so desired it, of joining in the purchase, which, by the way, Williamson evinced his willingness to do, it appears to me that the equitable basis upon which to regard such purchase will be to treat it as made by Thelwall, not for himself alone, but on behalf of Williamson and Burnett as well, they of course, in any accounting that may take place, being debited with a proportionate amount of the purchase-money. This, however, is somewhat by the way and not directly relevant to the issue under consideration. Reverting to that, it seems to me that the true date from which limitation should be computed is the month of August, 1877, when the Bank, by its purchase and possession under execution-sale, obtruded itself into the partnership property and so effected a dissolution. Whether it be regarded as falling within No. 106, sch. ii of the Limitation Law, which, as I have said, I do not think it does, or within No. 120, which appears to me to govern it, the suit was, in my judgment, in time, and the third issue must be decided in favour of the plaintiffs.

The fourth issue has been already answered by the distinct finding I have recorded in the second issue, that there was a partnership between Williamson, Burnett, and Thelwall in the Markham Grant Estate and its appurtenant mahals. Each of these persons therefore had a joint and several proprietary interest in such property, and this issue must likewise be decided in favour of the plaintiffs.

As to the fifth issue, the title of the defendant Bank is based upon the certificate of sale dated the 23rd July, 1877, which was granted under s. 256 of Act VIII of 1859. Objection was taken on the hearing of the case to the admissibility of this document by the counsel for the plaintiffs on the ground that it was unregistered. I was, however, of opinion, that it was not a compulsorily registrable instrument either under the old or the present registration law, and accordingly accepted it in evidence. It is obvious both from the decree and the sale-certificate, that the Bank's purchase extended only to the right, title, and interest of Thel-

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wall in the Markham Grant Estate and the appurtenant mahals, whatever that might turn out to be. In other words, the Bank bought neither more nor less than Thelwall could have transferred to it by a private sale. It does not appear to me convenient at this stage to discuss how this affected its position under its mortgage, for, assuming my antecedent finding that there was a partnership in the land to be correct, such mortgage could only be binding to the extent of Thelwall's share, unless made under the express or implied authority of his other partners, which question will have to be considered later on. As I have before remarked, subject of course to this reservation, the defendant Bank is neither in a better nor worse position than Thelwall himself would have been, and upon an account being taken will have to contribute to the liabilities and partnership in the assets on the same basis as he would have had to do. It therefore comes to this, that in reference to the fifth issue, I find that, *primâ facie*, all the Bank purchased and is entitled to is the "right, title, and interest of Thelwall;" but the finding must be subject to, and governed by, the conclusions to be presently recorded with respect to the eighth and ninth issues.

The sixth issue has been already answered in my finding on the third, namely, that the Bank's purchase in August, 1877, *de facto* effected a dissolution of partnership.

With reference to the seventh issue, I have in an earlier portion of this judgment remarked that, dealing with the matter equitably, I think the purchases of the shares by Thelwall in 1871 and 1873 should be regarded and treated as made on behalf of the partnership. As their effect, if not impeached or set aside, was to release Theobald's estate and Bishop, Wheler, and Raikes from all past and future liabilities of the partnership, in respect of which Burnett and Williamson still continued to all the world every whit as liable as Thelwall, and which they now will have to contribute to discharge, it appears to me only fair to hold that, as they incurred this largely increased responsibility from the purchase, they should have any counter benefit derivable therefrom. Consequently I am of opinion that at the time of the execution of the mortgage of the 31st May, 1875, the three partners, William-

son, Burnett, and Thelwall, were interested to the extent of one-third each in the Markham Grant Estate and the mahals attaching to it.

The eight and ninth issues may be conveniently considered and disposed of together, and in doing so it will be necessary to recall certain facts, from which may be gathered the history of the partnership and the nature of the relations between the partners. At the commencement of this judgment I have mentioned the circumstances under which the original deed of 1863 and the subsequent one of 1864 were entered into, as also that, under the second clause of the former document, one Palmer was appointed manager of the Estate, subject to the supervision of Theobald. Taking the matter up at this point, it appears that by 1866, though very substantial sums had been sunk in the Grant and in clearing the land for planting, it was still only in an embryo condition, and obviously demanded that a further and larger outlay should at once be made upon it. This the partners do not appear to have been at all willing to embark in, and after a meeting and discussion among some of them, at which Thelwall was not present, it was resolved that the best way out of immediate difficulties was to lease the Grant to Palmer temporarily, on the understanding that when the partnership was in funds sufficient to re-undertake the working, he would surrender it and resume his position as manager. Meanwhile the partnership was to be protected by him from any liabilities. In 1870 Theobald died, and soon afterwards Wheler and Bishop having expressed a wish to be rid of their interests in the concern, Thelwall intimated his readiness to purchase them, and ultimately he did so in September, 1871. I should have stated, however, that from the time when he was ordered on active service in or about 1864 down to 1867, Thelwall had never been near the Grant, and it appears to me more than doubtful whether he paid any of the calls that were made upon him from time to time during this period However, in 1867, he did make a flying visit to the Grant, and there found Palmer in charge, who, to use his own words, complained to him that "he could get no money and that the place was going to the devil. He asked me to advance funds, but I refused, as I thought it was

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not safe to advance moneys on the Grant, as the conditions of the warrant had not been carried out. I told Palmer that if he would lease me a portion of the Grant, so that the money expended on that portion could not be seized or made away with, I would provide funds to commence China grass cultivation on such part as was leased to me. Subsequently he did lease me about 1,000 acres. I got into possession in 1867 and began to plant China grass." I have said that this lease proceeding was a somewhat extraordinary arrangement, and I repeat the observation now. What authority Thelwall could have supposed Palmer to possess to grant him a lease of so considerable a portion of the partnership estate for purposes of cultivation, altogether foreign to the scheme and objects with which the partnership was formed, it is difficult to imagine. The circumstance has this significance however, that it strongly suggests the inference that Thelwall must then have learnt, if he did not know before, the precise nature of the position occupied by Palmer in reference to the property. It would appear that Thelwall also paid a visit to the Grant in 1868 and 1869. Subsequently in May, 1871, he again went there, and the following is his own description of what occurred: "When I got to the Grant I was served with a large number of summonses. I found there were no funds, and that the property was going to the devil. I found the place uncultivated and utterly neglected. 158 acres of tea land had disappeared, the asamis had bolted, the cattle had died, and the buildings were in a ruinous state, the canals blocked up, in fact it was in a state of bankruptcy. At that time the property, to my mind, had seriously deteriorated in value. I found Palmer the manager there. He was the reverse of sober and steady. I told him to clear out, and I afterwards found he had taken a cartload of books and papers. I searched to find books and accounts that I had seen when I was there before in 1869, but I could not find any. Then I took possession of the place." From this point numerous letters are to be found addressed by Thelwall to Williamson (Q, R, S, O, V, X, and Y), all written in April, 1871; A 1, 2, 3, 4, in May, A5, 7, in June, and A8, all in the same year, the sum and substance of them being that Thelwall proposed to Williamson that they should buy out all the other partners between them, and virtually embark in a joint

new partnership for the working of the Estate. Williamson does not appear to have given any decided answer one way or the other to this proposal, though he expressed his disapproval of the action adopted by Thelwall in ejecting Palmer (A62), and on the 22nd October, 1871, he wrote to Thelwall (A9) offering to sell his share and stating at the same time that he had already advanced upwards of Rs. 10,000 to the concern, which must under any circumstances be recouped, and that he expected to be dealt with liberally. To this Thelwall replied on the 31st October, 1871, in a letter (A10) which he says he intended as "an acceptance of Williamson's offer to sell his share." I do not, however, think that it can be so considered. On the contrary, all that subsequently transpired goes to show that no adequate offer was ever made by Thelwall to Williamson, nor was any cash forthcoming, and that the negociations between them on this point produced no result. On the 6th February, 1872, Thelwall wrote to Williamson (A11), and the position taken up by the latter is shown by his reply of the 15th of the same month (A12). To this in turn there is another letter from Thelwall to Williamson, dated the 15th April, 1872 (A13), enclosing a "Markham Grant balance sheet to 1st April, 1872," by which it was made to appear that the expenditure to that date had amounted to Rs. 18,464-5-5 against receipts Rs. 1,103-15-6, leaving a debtor balance of Rs. 17,360-5-11. Another account was also sent with this, showing Williamson to be indebted for current expenses and old liabilities in the sum of Rs. 6,375-9-6. In this letter Thelwall also makes the important statement that he had purchased Theobald, Wheler, and Bishop's shares for Rs. 12,000, and in passing it may be remarked that in his examination before me he stated that he borrowed the money from the Delhi Bank to pay these persons. With this letter of the 15th April, 1872, the correspondence directly between Thelwall and Williamson, as far as I am aware, comes to an end. In July, 1873, Thelwall acquired Raikes' share by payment, so he asserts, of Rs. 3,000, and in November of the same year he received a letter from Burnett, dated the 29th October, 1873 (A14), which is put in on the part of the defendants as showing that at this time Burnett had contracted to sell, and Thelwall had undertaken to buy, the former's share in the Markham Grant, and that a power-of-attorney had been granted by

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Burnett, who was in England and had been since 1864, to Colonel Black to act for him in the matter and complete the transfer. Before this, however, could be carried out, Colonel Black would seem to have come in contact with Williamson, and it is pretty obvious that, in consequence of what took place between them, the sale of Burnett's share to Thelwall was not and never has been completed. In 1874, in consequence of a paragraph in the *Pioneer* of the 31st August, 1874, to which his attention had been called, relating to the Markham Grant, Williamson consulted his solicitors, Messrs. Berners, Sanderson, and Upton, and instructed them to write to Thelwall demanding an explanation, which they did on the 9th September, 1874 (A21), receiving a reply (A96), in which Thelwall sets out his own position and that of Williamson and Burnett in reference to the property. When the contents of this letter were brought to the knowledge of Williamson he placed the whole matter in the hands of Messrs. Berners and Co., and a member of that firm had an interview with Messrs. Orr and Harris, who represented Thelwall, in the course of which "production of accounts," Thelwall's "dealings with the estate," and his "transactions in reference to the purchase" of the shares of Theobald, Wheler, Bishop, and Raikes were referred to as matters in respect of which full information was required by Williamson. By way of reply to this demand Messrs. Orr and Harris, on the 13th November, 1874, addressed a letter to Messrs. Berners and Co., but as it proceeds upon many assumptions which extraneous facts show to be incorrect I do not think much stress can be laid upon it. Subsequently to this Williamson, owing to ill-health, was obliged to go home to England, and he did not return until 1877. Shortly before his departure, namely, on the 22nd March, 1875, an offer was made by Thelwall, through his solicitors, to sell to Williamson his interest in the Markham Grant for Rs. 15,000 per anna share. This proposal naturally enough Williamson did not entertain, and he left instructions behind him that Thelwall was to be pressed to render an account, and that if he failed to do so, measures should be adopted to compel him. Ultimately, accounts were prepared, which are to be found in Book 3 and which purport to cover the period from 1867 to the end of May, 1875. It is sufficient to say that these were not considered satisfactory, and they appear

to be little more than a copy of the books of the Markham Grant, showing receipts and expenditure, without striking any balance or affording any information as to the position of the partnership. In May, 1877, Williamson, who had then returned to India, heard for the first time of the mortgage executed by Thelwall on the 31st May, 1875, and he at once gave instructions to his solicitors to inform the defendant Bank, that it was made without his consent, which was immediately done. Of the proceedings subsequently taken by the Bank I have already spoken, the result of which was that it obtained in August, 1877, under its sale-certificate, and has ever since held, possession of the whole of the Markham Grant. I have gone at this length into the facts bearing on the relations of Burnett, Williamson, and Thelwall, because they appear to me inextricably mixed up with the questions involved in the eighth issue. As far as Burnett is concerned it is impossible not to feel that he was careless and negligent of his interests in the partnership to an extraordinary and culpable degree, and was only too willing to let things take their own course so long as he was not called upon to contribute cash for the business. From 1864, when he left India, to October, 1873, when he was offering to sell his share to Thelwall, I am not able to find any thing, either in the shape of letters or in any other form, indicative of any demand or wish having been expressed by him for information, as to how the Grant was being worked and what was being done in reference to its progress and development. For aught that appears to the contrary he went to sleep over his rights, and was content not to awake so long as no calls were made upon, or enforced against, him. The whole history of this case from the beginning to the end discloses the most lamentable want of business-like habits on the part of each and all of the members of the partnership, and those of them who remain and are concerned in the present suit have only themselves to thank for all the complications that have now arisen. It is obvious that from the outset all the persons interested were either unwilling or unable to find capital sufficient successfully to open out and work the expensive scheme of tea cultivation they had in contemplation, and taking the whole amount of cash advanced prior to 1871, its absurd inadequacy to the requirements of the enterprise is abundantly manifest. The arrangement made with

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Palmer in 1866 only showed the hopeless predicament in which the concern was already placed, and from that year until 1871, when Thelwall ejected Palmer and took the whole control and management into his own hands, there can be very little doubt that affairs were going on from bad to worse. No doubt Thelwall's action in the matter was irregular, but despite suggestions to the contrary, I do not think that it was other than *bonâ fide* and taken with an honest and genuine desire to pull the estate out of its difficulties. The remarks I have made with regard to Burnett apply, though to a very much lesser extent, to Williamson, whose interest I am bound to say, upon a review of all the correspondence, it appears to me Thelwall had always under consideration and was anxious to protect. I confess that the insinuation and imputations to which Williamson appears to have given expression in reference to Thelwall subsequently are, to my mind, wholly without foundation or justification, and I see no reason to conclude otherwise than that the latter was doing his best to keep things going. No doubt, before embarking in so large an expenditure on the Grant as he did from 1871 to 1875, Thelwall should have consulted both Burnett and Williamson, and if they had refused to provide him with funds, he might at once have demanded the dissolution and winding-up of the partnership as it then stood. But this he did not do, and though he unquestionably did propose to Williamson that they should buy Burnett out and jointly carry on the concern, nothing ever came of the suggestion, and to the hour when the defendant Bank went in under its purchase the partnership between these three persons continued. It is noticeable that in 1871 and 1872, when the earlier of the advances were being obtained from the defendant Bank, and letters were passing directly between Thelwall and Williamson, the former does not mention a word of his having had to resort to the Bank for assistance, and, as far as I am able to form an opinion, neither Burnett nor Williamson had any intimation of these loan transactions until the latter first heard of the mortgage in May, 1877. Still I think it only reasonable to hold that they must have known that money was an absolute essential, even if only to save the Grant from resumption by Government, and that Thelwall would either have to find it himself or obtain it from other sources. At any rate they allowed him to con-

tinue in possession of the Estate, and so far as his expenditure upon it was reasonable and proper, I think they are equitably bound to contribute towards it according to their shares. This, however, is a very different matter from holding that they directly or indirectly authorized Thelwall to mortgage the Grant to the defendant Bank. It is a proposition of law which I do not think will be controverted that one partner cannot alone create a charge upon partnership real estate without the consent of all his partners, for he by himself cannot give a valid title. According to English law, one person cannot execute a deed under seal for another, unless specifically and in terms authorized by power of attorney or by deed to do so. In India, however, we do not have deeds under seal, nor is written authority absolutely essential, and the question becomes one of fact, namely, aye or no is express or implied authority established from the relations between the parties and the general circumstances of the case. A conclusion in the affirmative should not be drawn except upon cogent and clear evidence, and until so made out the presumption should be in the contrary direction. With regard to the matter before me, I find it impossible to hold that either Burnett or Williamson expressly or impliedly authorized Thelwall to create a charge upon the partnership real estate. If, however, the mortgage-debt in respect of which the mortgage was given, though unauthorized, was nevertheless one properly payable by the partnership, in that the loans composing it were absolutely essential to, and necessary for, the carrying on the partnership business, the defendant Bank is, in my opinion, entitled in the accounting to be paid the amount due as any other ordinary creditor of the partnership. There is no direct evidence one way or the other as to the knowledge on the part of the Bank of the existence of a partnership in the Markham Grant prior to 1875. Mr. Beresford, who was examined before me, did not take charge of the Mussoorie branch till the spring of 1874, and then Thelwall's indebtedness to the Bank amounted to Rs. 1,32,000, against which he had given various securities, charging his interest in the Grant. It is, however, impossible to believe that the defendant Bank was unaware that other persons were interested in the property besides Thelwall: indeed, the circumstance that Palmer had been in possession and working it from 1866 to 1871 was in itself one which

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should have raised doubts and suggested inquiry; and it is, to say the least of it, remarkable that when the mortgage of May, 1875, was executed, though the names of all those who had formed the partnership were mentioned in it, no step was taken by the Bank to ascertain from any of these persons if the assertions made by Thelwall, as to the extent of his interest in the Grant, which are embodied in the recitals, were accurate. I have no means of knowing, except from Thelwall himself, what statements and representations were made by him to Mr. Moss, the Manager of the Bank, at the time when the first loans were obtained. But the fact remains that between 1871 and 1874 Rs. 1,32,000 had been borrowed from the Bank, whose only security appears to have been a bond of the 22nd May, 1872, another of the 2nd October, 1873, and a letter of charge of the later date, which is unregistered. It is somewhat startling to observe the facility with which Thelwall was able to get this large sum of money, and I cannot help feeling that the Bank was greatly wanting in care and caution during the period I have mentioned, in allowing his loan account to swell to such enormous proportions. It is obvious that when Mr. Beresford took charge, he viewed the matter as one of an exceedingly serious and anxious character, and as I have before remarked, it is very odd that when he came to be aware of Burnett and Williamson's connection with the Grant, he did not put himself into communication directly with them, and so ascertain from the best source the position they claimed to hold in reference to the Grant. Giving all the facts and circumstances the best consideration I can, I must answer the eighth issue by saying that I find that Thelwall was not authorized, either actually or impliedly, by Burnett and Williamson to mortgage the Grant; that they did allow him to conduct the business of the Grant in such a manner as to make it appear that the control and management of it rested with him; and that for all ordinary business purposes he was their representative. The effect of these findings is that, while I hold the mortgage to be ineffectual as regards Williamson and Burnett, I nevertheless consider that they are bound, in any accounting that may take place, to recoup the defendant Bank for such advances as were made to Thelwall for the necessary purposes of the estate in the same proportion as they must discharge debts due to other creditors.

The tenth issue is disposed of by the findings on the eighth and ninth.

The eleventh issue has also already been virtually determined, but it may be convenient to repeat that such moneys of his own, as Thelwall has expended within the legitimate scope and for the proper purposes of the partnership, as originally contemplated by the partners, he will be entitled to be proportionately reimbursed by Williamson and Burnett.

This brings me to the end of the case, and in conclusion it becomes necessary for me formally to declare that Williamson and Burnett were partners with Thelwall in the Markham Grant, and that such partnership was dissolved on the 7th day August, 1877, and I accordingly direct that ———— be the liquidator of the estate and effects of the said partnership, and that he proceed to wind up the same with all convenient despatch. For the purpose of doing so, he must first ascertain what are the assets of the partnership and what property there is available to satisfy its debts and liabilities. He will next find out what these debts and liabilities are. In doing so he will bear in mind the remarks I have made in the course of the judgment as to the partnership only being responsible for such moneys as were reasonably and properly used in and for the carrying on the business of the partnership. For this purpose he will prepare an account showing the whole of Thelwall's transactions with the Bank, the moneys advanced to him, and the mode in which they were disposed of. He must also prepare an account of the moneys, if any, found by Thelwall, independent of the Bank, and trace out the purposes to which they were devoted. It will be for him also to say, whether the cultivation of China grass has been beneficial or otherwise to the Grant, and according as he determines this one way or the other, will Williamson and Burnett have or not have to contribute to discharge the loan obtained for that special purpose by Thelwall from the Bank. With regard to the amount expended by the Bank since it has been in possession of the Grant a separate account must also be prepared, and towards so much of it as has been properly expended in preserving and working the property, the plaintiffs will have to contribute in the proportion

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of one-third each. The liquidator will throughout bear in mind that the Bank occupy the position of Thelwall towards the plaintiffs, and that the accounting must be conducted upon this basis. When the above accounts have been taken and the liquidator has prepared his report, which I direct him to complete before the 30th of November next, he will return it into this Court, which will then proceed to dispose of the matter by a final decree.

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APPELLATE CIVIL.

Before Mr Justice Straight and Mr. Justice Mahmood.

SHANKAR LAL (PLAINTIFF) *v.* SUKHRANI AND OTHERS (DEFENDANTS).*

Mortgage—Unstamped transfer of mortgagee's interest, effect of—Re-transfer of interest—Award, effect of, on transfer—Unstamped instrument, admissibility of, in evidence—Finding of fact based on conjecture—Fraud.

On the 17th September, 1866, *G* gave *Z* an usufructuary mortgage of certain immoveable property to secure the repayment of Rs. 7,101 purporting to be advanced by *Z*. As a fact only Rs. 2,801 of that amount were actually advance by *Z*, the balance, Rs 4,800, being advanced by *R*. In 1868 *Z* sold the mortgagee's interest in the deed of mortgage to *R* for Rs 2,301, the transfer being by endorsement and not being stamped. In April, 1869, *G* transferred a portion of the mortgaged property to *A*. In September, 1869, *R* sued to have such transfer set aside, claiming in virtue of the deed of mortgage and the transfer endorsed thereon. On the 23rd September, 1871, the Court of first instance refused to receive the transfer by endorsement in evidence and to proceed with the suit, because such transfer was not stamped. On the 20th April, 1872, *Z* executed a stamped transfer of the mortgagee's interest in the deed of mortgage in favour of *R*. *R*, treating the order of the 23rd September, 1871, as an interlocutory one, presented the instrument of the 20th April, 1872, to the Court, and prayed that it would proceed with the suit. The Court proceeded with the suit and gave *R* a decree. This decree was reversed by the Court of first appeal on the ground that that instrument did not cure the defect of the transfer by endorsement, and that the order of the 23rd September, 1871, was final. The decree of the Court of first appeal was affirmed by the High Court in June 1873. Thereupon *R* made a criminal charge against *Z* of cheating, in respect of the transfer by endorsement. This charge was eventually dropped, and was followed by a reference to arbitration by *R* and *Z*. According to the agreement to refer, which was dated the 17th August, 1874, the dispute between the parties was whether *R* should return the deed of mortgage to *Z* and *Z* return the Rs. 2,301 to *R* or not. The arbitrators made an award, which was dated the 18th August, 1874, which directed, *inter alia*,

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* Second Appeal, No. 1075 of 1881, from a decree of W. Kaye, Esq., Commissioner of Jhansi, dated the 20th May, 1881, affirming a decree of Major T. J. Quin, Deputy Commissioner of Jalaun, dated the 9th February, 1881.

that *R* should return the deed of mortgage to *Z*, and *Z* return the Rs. 2,301 to *R*. The deed was returned to *Z*, but the money was not returned to *R*. In 1875 *Z* applied under Regulation XVII. of 1806 to foreclose the mortgage. In 1880, the mortgage having been foreclosed, *S*, as *Z's* representative, sued for proprietary possession of the mortgaged property. The lower Courts held that all the acts of *R* and *Z* subsequent to the disposal of *R's* suit of 1869 were fraudulent and collusive, and done with a view to evade the Stamp Law, and the person actually interested in the deed of mortgage was *R*, and not *S*, and on this ground, as well as on other grounds, dismissed *S's* suit.

Per STRAIGHT, J.—That the transfer by endorsement of the deed of mortgage, notwithstanding such transfer was not stamped, transferred to *R* the mortgagee's interest in the deed; that such interest could not be re-transferred to *Z* except by a formal instrument stamped according to law, inasmuch as any other mode of re-transfer would leave *Z* under the same disabilities as regards the Stamp Law as *R*, as any suit instituted by *Z* would, strictly speaking, be based, not on the deed of mortgage, but on the re-transfer; and that therefore, under these circumstances, and having regard to the fact that *Z* had not returned the Rs. 2,301 to *R*, *S* actually, though not ostensibly, based his suit upon a re-transfer of the mortgagee's interest in the deed of mortgage, which was not stamped, and for which he had not given any consideration, and consequently his suit was not maintainable.

Also that the award could not alter the effect of the transfer by endorsement.

Per MAHMOOD, J.—That the lower Courts were not justified in their findings as to the fraudulent and collusive nature of the acts of *R* and *Z* after the disposal of *R's* suit of 1869, or in finding that the person actually interested in the deed of mortgage was *R*, and not *Z*, such findings being based upon pure conjectures.

That the unstamped transfer by endorsement was inadmissible to show that *Z* had transferred his interest in the deed of mortgage to *R*, whether *R* or the mortgagors wished to use it in order to show that fact, and consequently *Z* must be still regarded as the person interested in the deed and *S* was therefore entitled to maintain the suit.

THE facts of this case were as follows:—The entire village Salakhna originally stood in the Government records as the property of Gopi Nath, who on the 17th September, 1866, executed a mortgage by conditional sale in favour of Zalim, whereby he transferred a twelve annas share of the village in lieu of Rs. 7,101 for a term of two years, during which the mortgagee was to be placed in possession of the share in lieu of interest. It was an admitted fact that of the consideration for the mortgage Rs. 4,800 had been advanced by one Ram Singh, though his name or the circumstance was not mentioned in the deed of mortgage. But about the year 1868 Zalim endorsed the mortgage-deed acknowledging the circumstance

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just described, and stating that only Rs. 2,301 had been paid from his own funds to the mortgagor, and that that sum had been paid to him by Ram Singh. The endorsement which bore no date or stamp was worded as a sale-deed conveying the rights under the mortgage-deed to Ram Singh. By proceedings which it is unnecessary to specify here the name of Ram Singh was entered on the 6th July, 1868, in the Government records as proprietor of a six annas share in the village. It was said that this was done at the instance of Gopi Nath, and in recognition of an original right of co-sharership which Ram Singh possessed irrespective of the mortgage-deed of the 17th September, 1866, purchased by him from Zalim. A dispute subsequently arose between Ram Singh and Gopi Nath in regard to certain money claims of the former against the latter, and they were said to have referred the matter to arbitration. The arbitrators gave their award on the 21st November, 1868 (Aghan Sudi 7th, Sambat 1925), declaring Gopi Nath liable to payment of Rs. 10,063 by the 24th June, 1869, to Ram Singh, and directing that, on default of such payment, the former was to make over the proprietary rights in six annas of the village to the latter. It was said that this six annas share was not the same as the six annas share in respect of which Ram Singh's name had already been entered, but that it was the remaining six annas share out of the mortgaged twelve annas share included in the deed of the 17th September, 1866. Ram Singh contended in the suit which will presently be mentioned that the result of the above-mentioned proceedings made him the recognized proprietor of the twelve annas share covered by the mortgage-deed of the 17th September, 1866, and left Gopi Nath as the recognized owner in possession of the remaining four annas share in the village, *viz.*, the four annas to which the mortgage had no reference.

On the 27th April, 1869, Gopi Nath executed an "*ikrar-nama*" purporting to convey a six annas share of the village to Alahyar Khan. The *ikrar-nama* was said to have been executed in recognition of the rights created by a previous deed executed by the former in favour of the latter on the 22nd July, 1865. But the latter *ikrar-nama* (*viz.*, that of the 27th April, 1869) purported to convey, not the six annas in respect to which Ram Singh's name had been entered on the 6th July, 1868, but the remaining six annas share out of

the mortgage. Gopi Nath thus retained only the four annas share unincumbered and unaffected by any transaction. His heirs were apparently still in possession of this share.

On the 11th September, 1869, Ram Singh brought a suit against Gopi Nath and Alahyar Khan. The suit was based, in the first place, on the original mortgage-deed in favour of Zalim dated the 17th September, 1866; and *secondly* on the endorsement of 1868 by Zalim conveying the deed to Ram Singh; and *thirdly* on the arbitration award of the 21st November 1868. The object of the suit was to recover possession of the six annas share by setting aside the transfer made on the 27th April, 1869, by Gopi Nath in favour of Alahyar Khan; Ram Singh's contention being that he was already in possession of the other six annas share, and that the transfer sought to be set aside was collusive, and made with the object of defeating his rights under the arbitration award of the 21st November, 1868.

The Deputy Commissioner in whose Court the suit was filed passed the following order on the 23rd September, 1871:—"The reconveyance of the deed ought to have borne a stamp of Rs. 8 under Nos. 51 and 9 of sch. A., Act X of 1862, and as it is not thus duly stamped the Court is *in limine* precluded by s. 14 of the Act from receiving and proceeding upon it in its present form: ordered accordingly." It did not appear what the Deputy Commissioner intended by this order. No decree apparently was passed or prepared in the case.

Matters stood thus, when on the 20th April, 1872, Zalim executed in favour of Ram Singh a registered deed (on stamped paper of the value of Rs. 25) whereby he acknowledged the validity of the endorsement of 1868, which purported to transfer the mortgage-deed of the 17th September, 1866, to Ram Singh. Ram Singh apparently did not regard the Deputy Commissioner's order dated the 23rd September, 1871, either as a final order or decree in the case; for on the 13th May, 1872, he filed an application stating that he had carried out the order of the Court by obtaining a stamped deed from Zalim and praying that the suit might be proceeded with. The new Deputy Commissioner apparently took the same view, and he tried the case on the merits and decreed Ram Singh's claim on the

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11th July, 1872, but this decree was reversed in appeal on the 1st October, 1872, by the Commissioner of Jhansi, on the ground that the deed of the 20th April, 1872, did not cure the defect of the original unstamped endorsement of 1868; that the former Deputy Commissioner's order dated 23rd September, 1871, was final; and that in any case the arbitration award of the 21st November, 1868, could not bind Alahyar Khan (defendant-appellant before the Court) who was no party to it. This decree was upheld on the 3rd June, 1873, by the High Court.

Upon this Ram Singh brought a criminal charge against Zalim accusing him of the offence of cheating (s. 418, Indian Penal Code) in respect of the endorsement of the mortgage-deed dated the 17th September, 1866. The Magistrate before whom the case was to be tried advised the parties to "settle their dispute amicably," and thus the criminal prosecution seemed to have ended on the 17th June, 1874. On the 17th August, 1874, Ram Singh and Zalim executed an agreement to refer the dispute between them to private arbitration of certain persons named therein. The dispute was stated in the agreement to be this. Ram Singh contended that the endorsement of the mortgage-deed having proved wholly ineffectual, he was entitled to return the deed to Zalim, and to recover from him the money he had paid as consideration for the transfer. On the other hand, Zalim objected to take back the deed and to return the money. The dispute was submitted to the arbitrators, who gave their award the next day, *viz.*, the 18th August, 1874. After stating the facts of the case and the contention of the parties, the award directed Ram Singh to return the mortgage-deed to Zalim, and directed the latter to pay back Rs. 2,301 to the former within one month. They further decided that the Rs. 4,800 originally advanced by Ram Singh was to be regarded as a loan due to him by Zalim, who was to repay it with two per cent. per mensem interest to Ram Singh, upon obtaining possession of the mortgaged property or upon realizing the money due under the mortgage. On the next day after the award, *viz*, the 19th August, 1874, Ram Singh filed an application in the Deputy Commissioner's Court praying under s. 327 of the old Civil Procedure Code (Act VIII of 1859) that the award might be filed. On the 22nd August, 1874, Zalim

filed a written statement saying that he could not pay Rs. 2,301 within one month as directed by the award; that Ram Singh had orally promised to defer the realization of the sum, and must be bound by his promise; that otherwise he (Zalim) had no objection to the award being filed. On the 21st September, 1874, Ram Singh appeared in person before the Deputy Commissioner and expressed his willingness not to claim Rs. 2,301 till Katik Sambat 1931 (November, 1874), and prayed that the original mortgage-deed of the 17th September, 1866, might be given back to Zalim. The latter seems to have agreed to the terms, and apparently took back the deed. Thereupon the Deputy Commissioner passed the following order in Hindustani:—"As proceedings in accordance with s. 327, Act VIII of 1859, have been completed in this case, it is ordered that the papers be consigned to the records, the deed of mortgage be given back to Zalim, and a copy thereof on stamped paper be put in by him for being kept on the record." This order bore the signature of the Deputy Commissioner and was dated the 21st September, 1874.

In the meantime the rights and interests of Ram Singh in the six annas share which stood in his name were sold in execution of a decree and purchased by his brother Jograj. On the 3rd December, 1874, Zalim applied to the Deputy Commissioner under ss. 7 and 8, Regulation XVII of 1806, praying that notices of foreclosure might be served upon (1) Gopi Nath, (2) Alahyar Khan, (3) Ram Singh, and (4) Jograj. The sum claimed under the deed of mortgage was stated in the application to be Rs. 27,767-2-8.

On the 6th September, 1875, the Deputy Commissioner, after writing a long memorandum in which he went into the facts of the mortgage, &c., ordered that notices of foreclosure should be issued in regular form in the terms of the application.

On the 15th September, 1880, the present suit was commenced by Shankar Lal, minor son of Zalim, through his mother and guardian Sukhrani. The defendants Nos. 1, 2 and 3 in the suit were the heirs of Gopi Nath, deceased; Jograj Singh was defendant No. 4; and Alahyar Khan defendant No. 5. The suit was based on the mortgage-deed of the 17th September, 1866; and the prayer in the plaint was to recover proprietary possession of the twelve annas

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share on the ground that foreclosure proceedings having been duly taken by Zalim, and the year of grace having expired, the mortgage was no longer redeemable, and was therefore foreclosed.

The three sets of defendants set up various pleas in defence, but it is not necessary to notice them here.

The Court of first instance held that the plaintiff was to be regarded as the representative in interest of Ram Singh; that the arbitration proceedings which ended in the award of the 21st September, 1874, were "a blind to conceal and protect Ram Singh's interest in the mortgage-deed"; that the latter had a lien on the property under the arbitration award; that he was therefore "the actual plaintiff in this present suit"; that as Ram Singh could no longer sue on the mortgage-deed, so the plaintiff was also precluded from maintaining the present suit; that the matter was therefore *res judicata*; and that the plaintiff's father Zalim had conspired with Ram Singh to evade the stamp duties leviable on the endorsement of 1868 On these grounds the Deputy Commissioner dismissed the suit without trying the case on the merits. The plaintiff appealed to the Commissioner, who also held that the suit was barred as *res judicata* under s. 13, Civil Procedure Code. He further held that the plaintiff had no property in the mortgage-deed, Zalim having parted with the whole of his rights and interests in it; that to regain an interest in the deed it must have been transferred to him by a valid instrument; that the decision of the arbitrators to the effect that the deed should revert to Zalim could not, in the absence of a legal transfer made in pursuance of that decision, transfer to him rights of which he had divested himself; that if such power were conceded to arbitrators "the stamp law would shortly become a dead letter." On these grounds the lower appellate Court dismissed the appeal.

The plaintiff appealed to the High Court. The principal questions raised by the appeal were (1) whether the litigation which ended in the dismissal of Ram Singh's appeal by the High Court on the 3rd June, 1873, barred the present suit as *res judicata* under s. 13 of the Civil Procedure Code; and (2) whether on the facts found the plaintiff, as representing his father Zalim, had *locus standi* to sue on the mortgage-deed of the 17th September, 1866.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Messrs *Ross* and *Howell*, Pandit *Ajudhia Nath*, and Lala *Jokhu Lal*, for the respondents.

The Court (STRAIGHT, J. and MAHMOOD, J.) delivered the following judgments :—

STRAIGHT, J.—I entirely concur in the conclusion at which both the lower Courts have arrived, namely, that the plaintiff-appellant had no genuine interest in the bond of the 17th September 1866, at the time of the institution of the present suit, nor has he at this moment, and that he is merely litigating " *be-nami* " for Ram Singh. I say nothing with regard to the question of *res judicata* raised by the first plea in appeal, as it does not appear to me necessary in order to dispose of the case to decide it. It may be doubtful whether the rejection of Ram Singh's suit of 1869 on the ground that the transfer to him was unstamped and unregistered precluded his again seeking the decision of a competent Court upon the merits, when he had, if he could do so, satisfied the requirements of the Stamp and Registration Laws, and so put himself into a position to sue. All this, however, seems to me beside the substantial point, namely, the competence of the plaintiff-appellant to come into court. Now it is obvious that at the time the transfer of the mortgage by Zalim to Ram Singh took place, it was intended to be a good and binding conveyance as between those persons, and so in law it undoubtedly was. The failure to affix the necessary stamp, or to have the instrument registered, were not matters in respect of which either of them could have taken advantage of the other, for it is clear that they were both " *in pari delicto* " and were perfectly well aware of what the law required of them. In my opinion, therefore, Ram Singh became by that transaction the legal transferee of the mortgage of September 1866, and could not divest himself of that character, unless by a formally stamped and registered document executed according to law. That is to say, any conveyance to Zalim without the observance of these statutory obligations would leave that person under the same disabilities as Ram Singh himself had been. For any suit he might institute would not be, strictly speaking, on the original mortgage, but upon the re-transfer. It is admitted that, prior to the original assignment by Zalim to Ram

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Singh, the latter had paid Rs. 2,300 to the former, and so bought up his interest in the mortgage. It is likewise conceded that, at the time of the subsequent transaction, no consideration whatever was paid by Zalim to Ram Singh. The real position of the plaintiff-appellant therefore is, that he actually, though not ostensibly, comes into court resting his title to sue upon an assignment which is unstamped and unregistered, and for which he has given no consideration. Looking at his case from a strictly legal point of view, it obviously fails. But further, no arbitration or award of arbitrators could alter the effect of a conveyance once legally executed, nor could any decision or declaration of theirs save a person from the operation of the Stamp and Registration Laws. Apart from all this, I fully coincide in the findings of facts of the lower Courts that the whole of the proceedings between Zalim and Ram Singh subsequent to the dismissal of the latter's suit were colorable and collusive, and carried out merely for the purpose of ostensibly investing Zalim with the right to sue, when the real plaintiff, and the only person who will benefit by the litigation, is Ram Singh. In a matter of this sort we have nothing to do with equities, nor is it any part of our duty to allow the consideration to affect us, that by adopting the decisions of the lower Courts, the mortgagor will escape payment of his debt. Both in its legal aspect, and upon the concurrent findings of fact, the suit, in my opinion, clearly fails, and has rightly been dismissed. The appeal must be dismissed with costs.

MAHMOOD, J.—After having earnestly considered this case, I very much regret I am unable to agree with my learned and hon'ble colleague in the conclusions at which he has arrived, and the order which he has proposed. As the decision of the points of law involved in the appeal depends upon somewhat complicated facts, I consider it necessary in delivering my judgment to recapitulate those facts, as found by the lower Courts, in order to elucidate the reasons on which my judgment is based.

(After stating the facts, as already set forth, and the points to be determined, the learned Judge continued:) I am of opinion that on both these points the lower Courts have arrived at erroneous conclusions. They have attached a significance to the Stamp Law which the Legislature never intended, and which the words of the

Act do not warrant. The object of the Stamp Laws is the collection of one form of revenue. They carry their fines and penalties with them, and in themselves contain adequate provisions to secure the interests of the State. It may be necessary for enforcing them to provide, as the Stamp Laws in India do provide, that if documents are not properly stamped they shall not be received in evidence by Civil Courts of Justice. But such provisions are penalties which can only affect remedies, and it is only in this manner that their effects can operate upon rights when such rights come before the Courts for adjudication. In the present case the lower Courts seem to think that because Zalim, in endorsing the deed of 17th September, 1866, omitted to execute the conveyance on stamp-paper, therefore everything which took place between him and Ram Singh afterwards was vitiated, and necessarily fraudulent and collusive, and done in bad faith.

It is a very common thing in this country, especially in the less advanced parts like the Jhansi Division, that people cannot distinguish between negotiable instruments which pass by endorsement, and instruments like a mortgage-deed which cannot be conveyed except by a properly stamped and registered deed. It is perfectly true that ignorance of law cannot be excused; but such ignorance cannot be treated, as the lower Courts have treated it, as an element of fraud and bad faith. There is no specific evidence whatsoever of fraud or bad faith on the part of Zalim and Ram Singh in the various transactions which have taken place between them in regard to the mortgage-deed. Till fraud and bad faith are proved they cannot be presumed. The Court of first instance has regarded every incident in the case with suspicion—an illustration of the observation of the Lords of the Privy Council in the case of *Jodonath Bose* v. *Shumsoonnissa* (1) that "the habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are perhaps too apt to see fraud everywhere." In this case the only motive suggested is the desire on the part of these two persons to evade payment of the stamp duty; but no evasion of stamp duty can carry with it penalties other than those which the Stamp Laws themselves provide.

(1) 11 Moo. I. A. 551.

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All that can be said on the basis of the Stamp Law in this case is, that the endorsement of the mortgage-deed cannot be admitted in evidence. But this case is as independent of that endorsement as the suit of Ram Singh was dependent on it. In neither case would the Stamp Law allow the admission of that endorsement in evidence. In Ram Singh's case the deficiency, or rather absence of the stamp, was fatal to his claim. It has quite the contrary effect in this case, as I shall presently show. I am aware that in appeals from appellate decrees this Court is bound to accept facts as found by the lower appellate Court. But in this case the findings of the lower Courts are not, properly speaking, findings of facts. They are a series of hypothetical and conjectural inferences drawn from facts which, so far as this appeal is concerned, are admitted on all hands. The judgment of the lower appellate Court, as I understand it, does not even profess to proceed on findings of facts, but purely on legal view of facts. The judgment is entirely based on the reasoning that because the plaintiff, as representative of Zalim, is indebted to Ram Singh, therefore "the real plaintiff is unquestionably Ram Singh," and the suit is in consequence barred by s. 13, Civil Procedure Code; further, because Ram Singh has not made "a legal transfer in pursuance of" the arbitration award, therefore "plaintiff had no property in the bond on which he sues." I am unable to regard findings of this kind as findings of facts such as the law contemplates. They amount only to legal inferences, and the expression of the legal views of the case as taken by the lower Courts; and I am of opinion that it lies within our province, as the second appellate Court, to decide whether such inferences and such views are correct under the law.

Beyond conjecture, not justified by the facts, there is absolutely no evidence to show that the criminal prosecution of Zalim by Ram Singh was collusive. On the contrary, under the circumstances as found by the lower Courts themselves, it was only natural that Ram Singh, after having made strenuous but unsuccessful attempts to enforce the mortgage-deed which he had obtained from Zalim, should begin to regard the latter as the fountain and origin of all the evils which had attended his defeat, and to look upon the unstamped endorsement by Zalim as conduct not falling short of cri-

minal cheating. The Magistrate to whom the complaint was made was right in regarding the matter unfit for a criminal prosecution. But his advice that the parties should settle the matter amicably was superfluous. It was not required by the law, and can have no legal bearing upon the rights in this case; but it led, as has been found by the Courts below, to the transaction as to the arbitration of August 1874, which I regard of great importance in this case. The dispute between Ram Singh and Zalim was an intelligible one, and natural under the circumstances. What could have been more natural than for Ram Singh to say to Zalim? "You took my money, and in lieu thereof endorsed the mortgage-deed in my favour; I have done my best to get the benefits of the mortgage, but I have failed simply on account of your fault in giving me an unstamped conveyance instead of a properly stamped one; you have cheated me by taking my money and giving me a deed which to me has proved a waste-paper, and instead of benefiting me, has caused me loss in litigation; take back your deed and return my money to me." Equally natural was it for Zalim to have declined any such request, and to have said—"You have kept the mortgage-deed all this time, you have been suing on it, and you are not entitled *now*, simply because you have been defeated, to come back to me after so many years to demand the repayment of the money which you gave me as the price of the deed." Such was the dispute between them as stated in their agreement of 17th August 1874. It amounted to nothing else.

The Court of first instance, proceeding not on any evidence but pure conjecture, has stigmatised it as done in *bad faith* and with the sole object of evading the Stamp Law. I am unable to put any such construction on the facts as proved; and judging human conduct by the ordinary presumptions in favour of good faith till the contrary is proved, I hold that there is nothing to warrant the inference arrived at by the Court of first instance, that the submission was not a *bonâ fide* one. The arbitration which followed the submission, far from attempting to defraud the Stamp Law, obeyed its authority in accepting the rule that the non-payment of stamp duty on the endorsement rendered it worthless as evidence of passing the mortgage-deed from Zalim to Ram Singh. It was indeed

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for this reason that the arbitration award placed Zalim in a worse position than he was before the submission. The arbitrators gave their award on the 18th August 1874—an award the terms of which appear to me to be just and equitable. It did not place Zalim in the shoes of Ram Singh, for that would virtually amount to giving validity to the unstamped endorsement of 1868, since the rights of Zalim would then depend upon those of Ram Singh. The award simply restored the parties to the position in which they were before the endorsement. It declared Zalim to be the owner as before of the mortgage-deed, and to be the debtor of Ram Singh to the extent of the money which he had taken from the latter, *plus* interest. Whether Courts of Justice, bound as they are by technicalities of procedure and substantive law, would have adjudicated upon the dispute in the same manner, it is not necessary for us to inquire. The powers of private arbitrators in this respect have from time immemorial been recognized in India to be far more extensive; and the rule followed in this country is not much at variance from that adopted in England :—"It has been said by Judges of great celebrity that under a general reference of all matters in difference the arbitrator is not confined within the rules of law and equity, that he has greater latitude than the Courts of law in order to do complete justice between the parties, and that he may take all moral questions into consideration in forming his judgment, and decide according to equity and good conscience; for instance, that he may relieve against a right which lies hard upon one party, but which, having been acquired legally and without fraud, cannot be resisted in a Court of Justice" (Russell on Arbitration, 4th ed., p. 110). "Arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law, as well as of the facts, applicable to the case upon them. If no reservation is made in the submission, the parties are presumed to agree that every question, both as to law and facts, necessary for the decision, is to be included in the arbitration. Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and on the facts, and under such a submission they are not bound to award on mere dry principles of law; but they make their award according to the principles of equity and good conscience" (Story's Eq. Jur. 11th ed., s. 1454.)

Such being the powers of arbitrators, the effect of their award is no less powerful. "An award is a final and conclusive judgment as between the parties respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal, except when it is provided expressly that it shall have a temporary effect only" (Russell on Arbitration, 4th ed., p. 476). In the present case the arbitration award of 18th August, 1874, was regularly filed in the Deputy Commissioner's Court under the provisions of s. 327 of the old Civil Procedure Code. The effect of this proceeding was to give the sanction of a decree of Court to the award, which thereby became matter of record. In other words, the award became as independent of proof and as conclusive between Ram Singh and Zalim as any decree of Court could be. But it has been contended, and the contention has been apparently accepted by the lower Courts, that the entire proceedings connected with the arbitration—namely, the submission dated 17th August, 1874, the award dated 18th August, 1874, and, finally, the order of the Court dated 21st September, 1874, were all collusive and fraudulent. But in my opinion fraud and collusion are terms which cannot be applied to the facts of this case. Against whom could the fraud and collusion be? There can be no fraud where the only parties whose rights can be affected by it know fully what they are doing. There can be no collusion in a case like this, unless a third party is to be the victim of the collusion. In this case the defendants, standing in the shoes of the mortgagor, cannot possibly be injured by the arbitration proceedings. If their rights are liable under the mortgage-deed, they are so whether the mortgage belongs to Zalim or to Ram Singh. On the other hand, if they are not liable, neither Zalim nor Ram Singh could enforce the terms of the mortgage against them.

It is true that the award cannot be conclusive as against the defendants' rights, but the award does not pretend to deal with those rights. As a matter of evidence the award cannot be regarded as conclusive proof against the defendants, but like judgments it is admissible in evidence to prove that the plaintiff, as Zalim's heir, and not Ram Singh, is the person entitled to the mortgage-deed of the 17th September, 1866. The word "*right*" as used in s. 13,

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Evidence Act, when read with the *Illustration* to that section, must be taken to include private rights as well as public rights. On the other hand, the word "*transaction*" as used in that section is wide enough to comprehend judgments, decrees, awards, &c., and makes them admissible in evidence, even though not between the same parties as those arrayed on opposite sides in the present litigation. The defendants in the present case are no doubt entitled to say that they will not recognise any person as competent to sue on the mortgage deed except the real owner of the deed. But all they can say and do say, is that Ram Singh, and not Zalim's heir, is entitled to the benefit of the mortgage. But though not precluded from setting up such a plea, the plea is met by the most cogent evidence that could be produced on the point,—*viz.*, the award which, as between Ram Singh and Zalim, is conclusive, and declares the latter to be entitled to the benefit of the mortgage.

Both the lower Courts seem to hold that the award declared Ram Singh to have a lien on the mortgaged property; but such is not the case. The award referring to the money taken by Zalim from Ram Singh distinctly says:—"Ram Singh to account it as a loan transaction." Thus under the award the claim of Ram Singh against Zalim, or rather his son, the present plaintiff, in respect of the money, is only a simple debt, and in no sense a charge upon the property. But such debt may become barred or otherwise irrecoverable. It does not attach to the property, and the entire hypothesis of the lower Courts, that Ram Singh is virtually the plaintiff, for he is the person most interested in the subject-matter of the suit, seems to me to be erroneous. He is interested only as much and no more as any other ordinary person to whom Zalim may happen to be indebted. A creditor naturally would like to see his debtor possessed of property rather than find him penniless. But a simple debt *per se* creates no legal interest in any specific property of the debtor. It is said that Zalim has never paid the Rs. 2,301 which he was bound to pay to Ram Singh under the award. But in the first place the matter was not the subject of an issue in the Courts below, nor was the question tried. But even granting that Zalim, or his son the plaintiff, has not to this day paid the Rs. 2,301 to Ram Singh, the fact only places the latter in a worse position,;

for it may be that the claim is by this time barred by limitation. In any case the non-payment of the money is a matter between the plaintiff and Ram Singh. It does not improve the position of the latter with reference to the property, and it is far from making him the real plaintiff in this suit. I am unable to see any thing in the case to warant the conclusion arrived at by the lower Courts, that he is the real plaintiff in the case. S. 13 of the Civil Procedure Code has therefore no application to the case. Nor under any other rule of law can the matter now in dispute be regarded as *res judicata*, so as to bar the inquiry into the merits of the rights created by the mortgage-deed of 17th September, 1866. Those rights were not the basis of the final adjudication against Ram Singh in the former litigation. The effect of the former adjudication was, that the essential link which connected Ram Singh with the deed—*viz.*, the endorsement of 1868, was such as the Courts could not recognize. Equally precluded are the Courts now from taking cognizance of that endorsement as an evidence of right of Ram Singh in the deed; and it appears to me that the Commissioner, in holding that Ram Singh is still the owner of the mortgage by virtue of that unstamped endorsement, is defeating the object of the very rule of the Stamp Law which he wishes to vindicate. The rule of the Stamp Law prohibiting the admission of unstamped documents, being a rule which belongs to the remedy, *ad litis ordinationem*, is to be enforced according to the law in force at the time when the suit is brought, not according to the provisions of repealed laws. Therefore, although the endorsement in question is said to have been made in 1868, when Act X of 1862 was the Stamp Law, yet the question of its admissibility in evidence in this suit (which was commenced since the present Stamp Act (I of 1879) came into force, must be decided according to the present law. This construction is borne out by the terms of cl. (5) and cl. (10) of s. 3 of the present Act itself; and s. 34 of the Act, which relates to the question now under consideration, is thus recorded:—"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered, or authenticated by any such person, or by any public officers, unless such instrument is duly stamped." Yet the lower appellate Court has done

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nothing more or less than "acted upon" and given effect to the unstamped endorsement, by holding that thereby "Zalim parted with the whole of his rights and interests in the bond." Such finding amounts to accepting in evidence an instrument the admission of which is prohibited, not only by the Stamp Law, but also by the Registration Act. The endorsement in question can no more be received in evidence *now on behalf* of the defendants to show that Ram Singh is or was the owner of the mortgage-deed, than it could be received in evidence *against* the defendants when Ram Singh, relying on it, came into Court to connect his rights with the mortgage-deed; and till that endorsement is received in evidence (and this of course cannot be done), Zalim, the mortgagee whose name appears in the original mortgage-deed, and after his death the plaintiff, must be regarded as having property in and entitled to the benefits of the mortgage-deed of the 17th September, 1866.

For these reasons I would set aside the decision of the lower Courts on both the preliminary points in the case, (*viz.*, the question of *res judicata* and the plaintiff's *locus standi*), and remand it under s. 562, Civil Procedure Code, to the Court of first instance for trial on the merits: the costs of this appeal to abide the result.

CIVIL JURISDICTION.

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Before Mr. Justice Straight and Mr. Justice Mahmood.

PACHAONI AWASTHI (DEFENDANT) *v.* ILAHI BAKHSH (PLAINTIFF) *

Institution of suit in wrong Court—Transfer of suit—Power of the Court to which suit is transferred to return plaint to be presented to the proper Court—Jurisdiction—Act X. of 1877 (*Civil Procedure Code*), *ss* 25, 57, 588 (6)—*Appeal.*

A District Court transferred for trial a suit instituted in a Court subordinate to it to another Court subordinate to it. The Court in which the suit was instituted was not the one in which the suit should have been instituted, and consequently the Court to which it was transferred made an order dismissing it, and directing the return of the plaint for presentation to the proper Court. *Held* that such order must be taken to have been passed under s. 57 of the Civil Procedure Code, and was therefore appealable under s. 588 (6); and that the defect of jurisdiction arising out of the institution of the suit in the wrong Court was not cured by the transfer of the suit.

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* Application, No. 192 of 1881, for revision under s. 622 Act X of 1877 of an order of W. Barry, Esq., Judge of Cawnpore, dated the 31st August, 1881, reversing an order of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 30th June, 1881.

ILAHI Bakhsh instituted a suit against Pachaoni Awasthi and certain other persons, which according to the provisions of s. 17 of the Civil Procedure Code should have been instituted in the Court within the local limits of whose jurisdiction the defendants resided or the cause of action arose. The suit was instituted in the Court of the City Munsif of Cawnpore. It was transferred by the District Judge to the Court of the Subordinate Judge of Cawnpore. The defendants set up as a defence to the suit, *inter alia*, that, inasmuch as the cause of action had not arisen within the local limits of the jurisdiction of the City Munsif of Cawnpore, neither did all the defendants reside within those limits, the suit had been instituted in the wrong Court, and was therefore not cognizable by the Subordinate Judge. The Subordinate Judge framed as the first issue for trial the issue:—"Is this suit cognizable by this Court"? Upon this issue the Subordinate Judge held as follows:—

"As regards the first point, it appears that the suit was filed in the City Munsif's Court on the 17th January last, and was transferred to this Court on the 7th May last. According to s. 15, Civil Procedure Code, every suit must be instituted in the Court of the lowest grade competent to try it. Ss. 16 and 17 lay down rules as to the particular Courts by which each class of suits is cognizable. By s. 25 the District Court is competent to transfer a suit to a subordinate Court competent to try it. It is evident, therefore, that, if the suit was not cognizable by the City Munsif, its transfer to this Court could not cure the original defect or irregularity, or change the venue, but in trying this case this Court must exercise the powers of the City Munsif. According to s. 17, Civil Procedure Code, all suits other than those mentioned in the preceding section must be instituted in the Court within the local limits of whose jurisdiction the cause of action arose, or all the defendants at the time of commencement of the suit actually and voluntarily reside or carry on business or personally work for gain. In the present case the cause of action arose in Ahmadpur, pargana Akbarpur (zila Cawnpore), within the jurisdiction of the Munsif of the locality where the wrongs for which compensation is claimed were committed, and where all the defendants except Nos. 3 and 6 reside, and neither has the leave of the Court been obtained in respect of the defendants

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who do not reside within the City Munsif's Court nor have they acquiesced in such institution of the suit. As the suit was wrongly brought in the City Munsif's Court, from which it has been transferred, it must be dismissed for this irregularity."

The Subordinate Judge then made an order directing the return of the plaint to the plaintiff for presentation to the proper Court. The plaintiff appealed to the District Judge, who held that, as the suit had been transferred to the Subordinate Judge, the latter was competent to try it, and it was of no real consequence where it was originally instituted, because the parties had agreed to the transfer, and the Subordinate Judge had jurisdiction in all cases in the district made over to him. The District Judge further held that the Subordinate Judge received his jurisdiction to try the case from him, and was therefore wrong in returning the plaint. The District Judge accordingly remanded the case to the Subordinate Judge for trial on the merits.

The defendant Pachaoni Awasthi applied to the High Court to revise the District Judge's order, contending that the order of the Subordinate Judge was not appealable, and that that order was a proper one under the circumstances.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the defendant.

Shaikh *Maula Bakhsh*, for the plaintiff.

The judgment of the Court (STRAIGHT, J. and MAHMOOD, J.) was delivered by

STRAIGHT, J.—We do not think that the order of the Judge passed under s. 25 of the Procedure Code could cure any defect of jurisdiction in reference to the institution of the suit. When once the case had been removed to the Subordinate Judge's file, he had all the powers that the original Court, from which it had been transferred, had, as to rejecting or returning the plaint. In our opinion the order of the Subordinate Judge must be regarded as passed under s. 57 of the Code and therefore appealable under cl. 6, s. 588. The Judge's view as to the effect of his order of transfer is, as we have pointed out, erroneous, and he has remanded the case for

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trial on inadequate grounds. We must therefore, having the whole matter before us and exercising our powers of revision under s. 622, set aside the Judge's order, direct the restoration of the appeal from the Subordinate Judge's order to the Judge's file, who will then proceed to dispose of the question of jurisdiction according to law, remanding the case or dismissing the appeal, as he may think proper. The costs of this and all other proceedings will follow the result of his decision.

Application allowed.

APPELLATE CIVIL.

1882
June 5.

Before Mr. Justice Straight and Mr. Justice Mahmood.

ANRUDH SINGH (PLAINTIFF) *v.* SHEO PRASAD AND OTHERS (DEFENDANTS).*

Mortgage—Suit for redemption—Decree for possession—Neglect to apply for execution within time—Fresh suit for redemption.

The plaintiff in this suit claimed possession of certain property by redemption of a usufructuary mortgage of it which he had given the defendants. The plaintiff had previously sued the defendants for possession of the property by redemption of the mortgage and had obtained a decree for possession of it, but had not applied for execution of such decree within the time allowed by law.

Held that the plaintiff, having obtained in the former suit a decree for possession of the property, and having by his own neglect lost his right to execution of such decree, could not be permitted to revert to the position which he held before the institution of that suit, and to bring a fresh suit for possession. *Sheikh Golam Hossein* v. *Alla Rukhee Beebee* (1) followed.

THIS case is not reported in detail, as the Court (STRAIGHT and MAHMOOD, JJ.) merely followed the ruling of the Full Bench in *Sheikh Golam Hossein* v. *Alla Rukhee Beebee* (1).

Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the respondents.

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* Second Appeal, No. 1452 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 13th September, 1881, affirming a decree of Maulvi Abdul Basit, Munsif of Chibramau, dated the 14th July, 1881.

(1) N.-W. P. H. C. Rep., 1871, p. 62.

1882
June 5.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

PURAN DAI (PLAINTIFF) *v.* JAI NARAIN AND ANOTHER (DEFENDANTS).*

Hindu Law—Widow's power of alienation—Gift for pious and religious purposes.

An alienation by a Hindu widow of her deceased husband's estate for pious and religious purposes, made for her own spiritual welfare, and not for that of her deceased husband, is not valid.

The power of a Hindu widow to alienate her deceased husband's estate for pious and religious purposes defined. *The Collector of Masulipatam* v. *C. V. Narrainapah* (1) referred to.

ONE Ram Kishen died in August, 1860, leaving a widow, Durga Dai, and a daughter, Puran Dai. His widow succeeded to his property, which comprised, *inter alia,* a certain house. In December, 1861, Durga Dai made a gift of the house to her family priest Chotey Lal. This gift was described in the instrument of gift as being "*Bishenprit*", or made in honour of the god Vishnu. In August, 1879, Durga Dai died; and in April, 1880, Puran Dai instituted the present suit against the representatives of Chotey Lal for possession of the house, alleging that its absolute alienation by Durga Dai was in excess of her powers as a Hindu widow who had succeeded to her husband's estate, and in prejudice of the plaintiff's reversionary right to that estate. The principal issue to be decided in the suit was whether the alienation of the house, which it was admitted was "pious and lawful" in its character, was or was not made for the benefit of the soul of the deceased Ram Kishen. The Court of first instance dismissed the suit on the ground that the gift was "pious and lawful." On appeal by the plaintiff the lower appellate Court concurred with the Court of first instance in dismissing the suit for certain reasons which it is not material for the purposes of this report to state, and because it found that "Ram Kishen's widow (Durga Dai) was empowered to make such a gift for a pious and religious purpose," and held therefore that the alienation was valid.

On second appeal by the plaintiff it was contended that the alienation was not valid as against her, there being no proof that it

* Second Appeal, No. 285 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 23rd December, 1880, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 30th August, 1880.

(1) 8 Moo. I. A. 500.

was made by Durga Dai for the benefit of the soul of the deceased Ram Kishen

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondents.

The judgment of the High Court (STUART, C. J., and TYRRELL, J.), so far as it is material for the purposes of this report, was as follows:—

TYRRELL, J.—It appears to us that both Courts have overlooked the crucial question, which was for whose benefit was the alienation made. It is beyond controversy that a "*Bishenprit*" donation made by the full and absolute owner of a property would be in itself a pious and lawful act. But it is equally certain that the disposing powers of a Hindu widow succeeding for her life to the estate of her deceased husband fall far short of full and absolute dominion. Such a person has power to alienate so much of such property and no more as may be necessary for one or more of the following definite purposes only, *viz.*, to pay debts contracted by the husband; to support such members of his family as he, if living, would have been bound to support; to maintain herself in decency and sobriety; to perform his exequial and subsequent ceremonial rites; and lastly to make suitable gifts for the benefit of *his* soul.

This rule is referred to in the Privy Council case cited by the Court of first instance,—*The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1), where their Lordships said: "It is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes." Here we find the principle laid down which is to be applied in test of alienations of the character before us, and it is their direct and especial reference to the spiritual welfare of the deceased owner of the estate.

The point is now covered by authority that acts of alienation calculated to be of religious benefit and efficacy to the widow, or to

(1) 8 Moo. I. A, 520.

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any persons other than the deceased owner, will not justify an alienation of any part of the property in the hands of the widow. It has been justly pleaded in the second and third grounds of appeal that there is nothing on the record sufficient to show, nor other good reason for believing, that the gift of the house in suit, made some sixteen months after the death of Ram Kishen, without any reference to him or his funeral celebrations, and specifically declared to be "*Bishenprit*," or to the honour of Vishnu, was a gift made to benefit Ram Kishen in his after-state; and was not, on the contrary, as indeed from the terms of the deed of gift in this case it plainly appears to be, an offering by the widow to a favoured idol for her own special credit and spiritual advantage. The law on this subject is well summed up in the Tagore Law Lectures for 1879, published in 1881, pp. 226 and 227, in eleven brief and distinct propositions, the 1st, 2nd, 4th and 5th of which are as follows:—

"(1). The widow must enjoy the estate during her life. (2) The enjoyment must be by moderate use of it. * * * * (4) She is not entitled to make a gift, mortgage, or sale of it. (5) But a gift or rather alienation is permitted for the completion of her husband's funeral rites." And subsequently in the same work at p. 307 it is stated: "She (the widow) may likewise make a gift proportioned to the extent of her late husband's property for the benefit of his soul. * * * * But she is not permitted to alienate by gift or sale the whole or even a part of the property solely at the suggestion of her own will and pleasure."

In the present case such a view of the law is corroborated and enforced by the fact that in 1864 the present plaintiff, Puran Dai, in the lifetime of the widow sued successfully to set aside other alienations made by Durga Dai in respect of property in the jurisdiction of the Bengal Presidency, including a gift to a Gyawal priest similar to the gift the subject of the present case. Puran Dai got a decree from the Shahabad Court on the 19th August, 1865, invalidating these alienations, and the decree was confirmed in appeal by the Calcutta High Court on the 8th March, 1866. In this view of the law and facts of this case, we set aside the decrees of the Courts below; and decree the claim of the plaintiff and this appeal with costs.

Appeal allowed.

CIVIL JURISDICTION.

1881
June 12.

Before Mr. Justice Straight and Mr. Justice Mahmood.

LACHMIN (PLAINTIFF) *v.* GANGA PRASAD AND ANOTHER (DEFENDANTS).

Debt due to estate of deceased person—Suit by legal representative—Certificate for collection of debts—Act XXVII of 1860, *s.* 2.

It is not an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate that such legal representative should first obtain a certificate under Act XXVII of 1860.

THIS was an application by the plaintiff in a suit, instituted in the Court of Small Causes at Mirzapur, for revision of the decree dismissing the suit. The plaintiff had sued certain persons for Rs. 260 due to the estate of her deceased husband, claiming as his legal representative. The Small Cause Court Judge dismissed the suit on the ground that the plaintiff was not in a position to maintain it, as she had not obtained a certificate under Act XXVII of 1860.

The plaintiff contended that it was not necessary that she should have obtained a certificate under Act XXVII of 1860 before she instituted the suit.

Lala *Lalta Prasad*, for the plaintiff.

The defendants did not appear.

The judgment of the Court (STRAIGHT, J. and MAHMOOD, J.) was delivered by

STRAIGHT, J.—We do not think that the Judge of the Small Cause Court was right in throwing out the plaintiff-applicant's suit on the ground that she had obtained no certificate under Act XXVII of 1860. She came into Court alleging herself to be the legal representative of her deceased husband Rai Chand, and to this allegation the defendants took no exception, their objection being confined to the one ground that she had no certificate. The word "compelled" in s. 2, Act XXVII of 1860, is not happily chosen, and at first sight appears to declare a general prohibition of the widest kind. But the qualifying paragraph at the end of the clause undoubtedly indicates that a suit to recover a debt due to a deceased person's estate, or a proceeding to enforce execution of a decree

* Application, No. 102 of 1882, for revision under s. 622 of Act X of 1877 of a decree of Babu Ram Kali Chaudhri, Judge of the Court of Small Causes at Mirzapur, dated the 24th November, 1881.

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obtained by such deceased person during his life, may, after his death, be instituted by his legal representative, without a certificate first obtained. If the Court is satisfied that the debt is being withheld from "vexatious," that is, unreasonable or merely dilatory, "motives," and not from any "*bonâ fide*" objection on the part of the debtor to the title of the person seeking recovery, it may decree the claim, absence of certificate notwithstanding. If on the other hand the Court considers that the debtor has grounds for "a reasonable doubt" as to the party entitled, it may refuse to issue any compulsory process to enforce payment, until the plaintiff has obtained the requisite certificate. We therefore do not think that it is an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate, that such legal representative should first obtain a certificate under Act XXVII of 1860. We accordingly allow the application for revision, and direct the Small Cause Court Judge to restore the case to his file, and, having regard to our preceding observations, to proceed to dispose of the case according to law.

Application allowed.

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June 12.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PHUL CHAND (DEFENDANT) *v.* LACHMI CHAND (PLAINTIFF)*

Hindu Law—Joint Hindu family—Debts contracted by Father as manager of family business—Sale of ancestral property in execution of decree against Father—Son's share.

N, a member of a joint Hindu family, consisting of himself, his wife, and his minor son, *L*, managed the joint family business, which was carried on under the style of "Atma Ram Anokhe Lal." As manager of such business he contracted certain debts, for which he was sued as the "proprietor" of the firm of "Atma Ram Anokhe Lal," and for which decrees were passed against him, in execution of which ancestral property of the family was sold. *L*, his minor son, sued to have such sale set aside, and to recover his share of such property, on the ground that such decrees had been passed against his father personally, and only his interest in such property passed by such sale. *Held* that, looking at the capacity in which *N* was sued, and the nature of the debts for which such decrees were given

* Second Appeal, No. 1409 of 1881, from a decree of M. S. Howell, Esq., Judge of Shâhjahânpur, dated the 9th September, 1881, reversing a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shâhjahânpur, dated the 13th December, 1880.

such decrees must be taken to have been passed against *N* as the managing head of the family, and *L* was therefore not entitled to recover his share of such property.

THE facts of this case were as follows:—About thirty years before the institution of the present suit one Durga Prasad set up business as a banker at Shâhjahânpur under the style of "Atma Ram, Anokhe Lal". On his death his son Nanak Chand, a defendant in the present suit, carried on the same business under the same style. After some time Nanak Chand added to his banking business a produce business. In the course of this latter business he entered into certain time-bargains for the delivery of grain with two firms at Cawnpore named respectively Phul Chand, Makhan Lal, and Hazari Lal, Bakhtawar Lal, defendants in this suit. These time-bargains resulted in a pecuniary loss to Nanak Chand, regarding which litigation ensued between the Cawnpore firms and him, and those firms obtained decrees for money against him on the 5th September, 1877, and the 24th June, 1878.

In execution of their decrees the decree-holders caused the rights and interests of Nanak Chand in certain ancestral properties to be attached and proclaimed for sale. Thereupon Lachmi Chand, the minor son of Nanak Chand, the plaintiff in the present suit, applied by his next friend, his mother Ganga Dai, to the Court executing the decrees to exempt from sale his rights and interests in the properties under Hindu law, which amounted to a moiety of the properties. This application was refused on the 24th August, 1880. On the 25th August, 1880, the properties were put up for sale in execution of the decree held by the firm of Phul Chand, and were purchased by Phul Chand. In September, 1880, the present suit was instituted on behalf of Lachmi Chand by his mother against the members of the Cawnpore firms and his father, in which he sued to set aside the order of the 24th August, 1880, and for a declaration of his right to one moiety of the properties which had been put up for sale on the 25th August, 1880. The Court of first instance dismissed the suit on the ground that the decrees were binding on the family of Nanak Chand, inasmuch as the business in which the loss, eventuating in the decrees and the sale of the properties, resulted, was undertaken by Nanak Chand for the benefit of the whole family. The plaintiff appealed, and

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the lower appellate Court fixed the following issues for determination :—" Was or was not the debt which resulted in the sale under reference incurred for a purpose which in the terms of the Hindu law was "immoral?" Is the plaintiff, with reference to the provisions of the Hindu law, as stated by the decisions of the Courts, entitled to a decree?"

In respect of the first of these issues the lower appellate Court observed that a time-bargain could not, in the class to which the plaintiff and his father belonged, be properly called illegitimate business, and that, had the particular transactions under reference resulted in a gain instead of a loss, the plaintiff would have shared in the benefit arising from them. In respect of the second issue, being of opinion that the ascertainment of the true nature of the debts and decrees being essential to a right decision of such issue, and their true nature not having been distinctly determined, the lower appellate Court remanded the case for the decision of the following issue :—" When he contracted the obligations which resulted in the suits in which decrees were passed on the 5th September, 1877, and the 24th June, 1878, or when he contracted either of them, and if so which, was Nanak Chand acting in a purely individual capacity, or as the head and representative of the joint family consisting of himself, his wife, and his minor son?"

The Court of first instance found on this issue that Nanak Chand contracted the obligations, and was sued, as representative of the family, and not in his individual capacity. The lower appellate Court accepted the former part of this finding, *viz.*, that Nanak Chand contracted the obligations as the representative of the family; but not the latter part, *viz.*, that Nanak Chand was sued in respect of those obligations as the representative of the family; and held that the plaintiff was entitled to a decree for a moiety of the properties. It observed on this point as follows :—" The creditors might have sued the members of the firm under their real names or under the name of the firm, " Atma Ram, Anokhe Lal," like any other unregistered company. As a matter of fact they seemed to have sued Nanak Chand under his own name. In *Samalbhai Nathubhai* v. *Someshvar* (1), relied on by the res-

(1) I. L. R., 5 Bom. 38.

pondents, the creditors sued all the three members of the family by name. Here the suits were brought against "Nanak Chand proprietor of the firm named Atma Ram, Anokhe Lal," and "Nanak Chand proprietor of the firm of Atma Ram, Anokhe Lal;" and the decrees were passed against "Nanak Chand, defendant." The two sale-certificates describe the judgment-debtor as "Nanak Chand," and certify that the respondent Phul Chand bought the properties therein described, some of which are described as belonging to the "judgment-debtor," while the rest are not described as belonging to any one. It seems therefore that the respondent Phul Chand bought only Nanak Chand's share—*Venkataramayyan* v. *Venkatasubramania Dikshatar* (1); *Pursid Narain Singh* v. *Ronooman Sahai* (2); *Luchmun Dass* v. *Giridhur Chowdhry* (3); *Bika Singh* v. *Lachman Singh* (4); *Nanhak Joti* v. *Jaimangal Chaubey* (5). The authorities to the contrary—*Deva Singh* v. *Ram Manohar* (6); *Gaya Din* v. *Rāj Bansi Kuar* (7); *Ram Narain Lal* v. *Bhawani Prasad* (8)—differ in that in these cases there was a decree directing the sale of property mortgaged by the father, to enforce the lien against which the suit had been bought, so that there was a clear indication throughout the litigation that the creditor was proceeding against the whole family property, whereas here there was none, for "proprietor of the firm *etc.*" may mean simply "a proprietor." It seems to me therefore that the appellant (plaintiff) is entitled to recover his half share of the property."

The defendant Phul Chand appealed to the High Court, contending that, regard being had to the fact that the plaintiff's father had acted as the representative of the family in the matter of the contracts in respect of which he had been sued, and such contracts were lawful, the lower appellate Court had improperly held that the plaintiff was entitled to recover his share of the property, merely because he was not a party to the suit against his father.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath* and Babu *Ratan Chand*, for the respondent.

(1) I. L. R., 1 Mad. 358.
(2) I. L R., 5 Calc. 845.
(3) I. L. R., 5 Calc. 855.
(4) I. L. R., 2 All. 800.
(5) I. L. R., 3 All. 294
(6) I. L. R., 2 All. 746
(7) I. L. R., 3 All. 191.
(8) I. L. R., 3 All. 443.

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The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—It is unnecessary to detail at length the facts out of which the question of law to be determined by this appeal arises, as they are very fully set forth in the judgments of the lower Courts. It is found as a fact that the firm of Atma Ram, Anokhe Lal, was a joint family concern, that Nanak Chand the father of the plaintiff was the manager, that the debts in respect of which the decrees of 1877 and 1878 were passed were incurred in the course of the business of the firm, and that they were not immoral or improper, but that on the contrary, if profit had accrued from the transactions out of which they had arisen, the plaintiff would have participated in it. In all these findings the two lower Courts coincide, but the Judge has decreed the plaintiff's claim on the technical ground, that as he was not made a party to the suits in which the decrees were passed against his father Nanak Chand, his interest in the joint property was not affected by them, and that the auction-purchasers at sale in execution of decree acquired no more than the right, title, and interest of Nanak Chand.

Having regard to the course of recent decisions and to the opinion of the Privy Council, that "in execution proceedings the Courts will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right," we cannot adopt the conclusion of the Judge. The firm of Atma Ram, Anokhe Lal, was founded by the grandfather of the plaintiff, and Nanak Chand his father was jointly interested in it from his birth, and so in his turn was the plaintiff. When Nanak Chand succeeded Durga Prasad, the firm continued under the same name, and the business was conducted as heretofore, except that Nanak Chand was the manager instead of his deceased father. As the plaintiff by birth became entitled to share in the business as one of the joint proprietors, so did he necessarily become liable to contribute his proportion towards the discharge of any debts that might be incurred or losses made by the managing member. When the suits of 1877 and 1878 were instituted, Nanak Chand was cited as proprietor of the firm of Atma Ram, Anokhe Lal, and looking at the capacity in which he was

sued, and the nature of the debts for which the decrees were given, we think they must be taken to have been passed against him as the head of the family. We may add that the first Court found very clearly that the present suit was in reality instigated by Nanak Chand for the purpose of depriving his creditors of a considerable portion of the fruits of their execution against him. In the majority of suits of the description of the present, a similar state of things is to be found, and it is well known that litigation of this kind, which involves a direct breach of the first duties of allegiance and respect from Hindu sons towards their fathers, would scarcely, if ever, be instituted without collusion on the part of the latter. Consequently a claim by a son, alleging the immorality of his father as the ground for setting aside a transaction entered into by the latter, must always be viewed with great suspicion, especially when the interests of a *bonâ fide* purchaser for value at sale in execution of decree have to be considered. The appeal must be decreed with costs and the judgment of the first Court dismissing the plaintiff's claim restored.

Appeal allowed.

CIVIL JURISDICTION.

1882
June 15.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

BALAK TEWARI (PLAINTIFF) *v.* KAUSIL MISR AND OTHERS (DEFENDANTS),*

Incidental decision of issue—Appeal—Objection by respondent—Act X of 1877 (*Civil Procedure Code*), *s.* 561.

The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree had not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance; and the defendants objected to the decree, contending that such tree belonged to them. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter "against the defendants," within the meaning of s. 561 of the Civil Procedure Code, and, as the decree was limited

* Application, No. 19 of 1882, for revision under s. 622 of Act X of 1877 of a decree of T. Benson, Esq., Judge of Azamgarh, dated the 18th September, 1881, affirming a decree of Maulvi Kamar-ud-din, Munsif of Azamgarh, dated the 16th June, 1881.

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to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal, and therefore the appellate Court was not warranted by law in entertaining the objection taken by the defendants.

THIS was an application by the plaintiff in a suit for revision of the appellate decree made in the suit by the District Judge of Azamgarh, dated the 18th September, 1881. The plaintiff had sued the defendants for Rs. 15, the value of the fruit upon a certain tamarind tree, which he alleged belonged to him, and of which he alleged the defendants had wrongfully taken the fruit on the 3rd February, 1881. The defendants set up as a defence to the suit that the tree in question belonged to them and not to the plaintiff; and that the fruit on the tree had not been taken on the 3rd February, 1881, but was still on the tree. The Court of first instance (Munsif) dismissed the suit on the ground that the fruit of the tree had not been removed, observing that it was incidentally proved that the tree belonged to the plaintiff. The order of the first Court was "that the plaintiff's suit be dismissed." The plaintiff appealed, and the defendants preferred an objection under s. 561 of the Civil Procedure Code, urging that the tree belonged to them. The lower appellate Court (District Judge) dismissed the plaintiff's appeal, and allowed the objection of the defendants, finding that the tree belonged to them. The order of the lower appellate Court was as follows:—"Appeal dismissed and objection allowed."

The plaintiff contended that, as the Court of first instance had decided the question of the ownership of the tree incidentally only, and the defendants could not have appealed from its decree, the lower appellate Court had improperly entertained the objection of the defendants.

Babu *Baroda Prasad Ghose*, for the plaintiff.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the defendants.

The judgment of the Court (TYRRELL, J. and MAHMOOD, J.) was delivered by

TYRRELL, J.—This application is valid. The Munsif did not make a finding on a question substantially in issue respecting the possession of the tree, the fruit of which is in question. He did not

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therefore come to any decision in this matter "against the defendant" in the sense of s. 561 of the Civil Procedure Code. Indeed the decree is clearly and explicitly limited to dismissing the plaintiff's claim for the price of certain fruit removed, on the single ground that the fruit had not been removed. The defendant then as respondent before the lower appellate Court was not qualified to take an objection to the decree on a ground outside of and foreign to the decree, which clearly could not have been taken by way of appeal. The Judge therefore assumed jurisdiction not warranted by law when he proceeded to try and determine the respondent's objection in this case. We set aside the portion of the lower appellate Court's decree allowing this objection with costs, and limit the same to a decree dismissing the appeal of the plaintiff with costs. This application is allowed with costs.

Application allowed.

APPELLATE CIVIL.

1882
June 16.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

BHOJRAJ AND ANOTHER (DEFENDANTS) *v.* GULSHAN ALI AND ANOTHER (PLAINTIFFS)*

Breach of contract—"Continuing breach"—Act XV of 1877 *(Limitation Act), s.* 23 *and sch.* ii, *No.* 143—*Act IX. of* 1871 *(Limitation Act), s.* 23.

The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land and that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid such fees, and more than twelve years after the first default the vendors sued them for possession of such quantity of such land. *Held* that there had not been a "continuing breach of contract," within the meaning of s. 23 of Act XV of 1877, and therefore the provisions of that section were not applicable to the suit; and further that the suit, being governed by No. 143, sch. ii of Act XV of 1877, and more than twelve years having expired from the first breach of such agreement, was barred by limitation.

The difference between s. 23 of Act IX of 1871 and Act XV of 1877 pointed out.

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* Second Appeal, No. 1478 of 1881, from a decree of H. F. Evans, Esq., Judge of Moradabad, dated the 14th September, 1881, reversing a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 16th April, 1881.

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BHOJRAJ v. GULSHAN ALI.

ON the 8th May, 1844, Bhojraj, one of the defendants in this suit, and Kewal Ram, who was represented by the remaining defendants Parshadi and Salik Ram, executed an "*ikrar-nama*" in favour of Aman Ali, Ali Muhammad, and Sultan Muhammad, who were represented by the plaintiffs. Under the terms of this instrument the executants were liable to pay certain annual fees, called "*kasrat-i-dami*," in respect of a 1 biswa 10½ biswansis share in certain muafi lands purchased by them. These fees, which amounted to Rs. 3-13-0 per annum, were payable to the obligors of the *ikrar-nama*, the terms of which, so far as they are material to this case, were as follows:—"Should there be any objection to the payment of Rs. 3-13-0 per annum, then 45 bighas and 11 biswas *kham* land shall be separated out of the 1 biswa 10½ biswansis muafi for Aman Ali, Ali Muhammad, and Sultan Muhammad aforesaid, and we or our representatives have and shall have no objection at all to the terms of this agreement" The plaintiffs in this suit alleged that, under the terms of the *ikrar-nama*, the defendants continued to pay the fees up to 1285 fasli, "when they ceased to do so, and preferred a complaint in the Settlement Court, and they (plaintiffs) were directed on the 31st July, 1877, to sue in the Civil Court." The plaintiffs accordingly commenced the present suit on the 22nd December, 1880, for recovery of possession of 45 bighas and 11 biswas of the land mentioned in the *ikrar-nama*, and for Rs. 11-0-6 mesne profits, on the ground that the defendants had failed to pay the fees, and the plaintiffs, as the representatives of Aman Ali, Ali Muhammad and Sultan Muhammad therefore became entitled to proprietary possession of the land under the terms of the *ikrar-nama*.

The Court of first instance dismissed the suit on the ground that the *ikrar-nama* had never been acted upon; that the fees "were never realized by the plaintiffs from the time the *ikrar-nama* was executed"; and that the suit was therefore barred by limitation." On appeal by the plaintiffs, the lower appellate Court, while agreeing with the Court of first instance in its findings of fact, held, as regards the question of limitation, that "each failure on the part of the defendants to pay the annual sum of Rs. 3-13-0 was a new breach giving a new right to eject, and the suit was therefore

within time, although no payment had been made within the last twelve years." For this view of the case it relied upon the case of *Sadha* v. *Bhagwani* (1), which was decided when the Limitation Act IX of 1871 was in force. The lower appellate Court accordingly gave the plaintiffs a decree.

On second appeal by the defendants it was contended on their behalf that, on the facts found by the lower Courts, the suit was barred by limitation.

Pandit *Bishambhar Nath* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Shah *Asad Ali*, for the respondents.

The High Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgments:—

MAHMOOD, J. (After stating the facts, continued):—Bearing in mind the provisions of the last paragraph of s. 2 of the present Limitation Act, there can be no doubt that the present case is governed by the provisions of Act XV of 1877, and not by those of Act IX of 1871. Whether the present suit would have been within limitation if brought whilst the latter Act was in force is therefore a question with which we are not concerned. But the Judge, in following the ruling of this Court in the case of *Sadha* (1), does not appear to me to have considered that that case was decided under s. 23, Act IX of 1871, and that the provisions of that section have undergone a considerable change in the corresponding s. 23 of the present Act. For the purposes of this case, it is not necessary to discuss minutely all the alterations in the law which s. 23 of the present Act has introduced. It will be sufficient to confine my observations to the point on the determination of which the decision of the appeal depends. The rule contained in s. 23 is a rule for computation of the period of limitation. The section of Act IX of 1871 gave the benefit of the rule to suits "for the breach of a contract, where there are *successive* breaches," and also to suits "where the breach is a continuing breach." The corresponding s. 23 of Act XV of 1877 confines that benefit to the latter class of

(1) N.-W. P. H. C. Rep., 1875, p. 53.

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cases only (*viz.*, cases of "a *continuing* breach of contract,") and provides that in such cases "a fresh period of limitation begins to run at every moment of the time during which the breach continues." But I have no hesitation in holding that the present is not a case of "a continuing breach" of contract at all. The obligation created by the *ikrar-nama* of the 8th May, 1844, was not of such a continuing nature as is contemplated by the Act, and there could therefore have been no "*continuing* breach" such as would entitle a suit based thereon to the benefit of s. 23 of the present Act. That section contemplates cases like the covenant by a tenant to keep the tenanted building in repair; cases in which the obligation created by the contract is *ex necessitate* of a continuing nature; and the right of action therefore naturally arises every moment of the time during which the breach continues. In the present case the obligation created by the *ikrar-nama* was of a recurring kind, and could admit only of a series of "*successive* breaches," such as were provided for by s. 23, Act IX of 1871, but are not within the purview of s. 23 of the present Act. The precedent which the Judge has relied on is therefore wholly inapplicable to the present case, which is governed by Act XV of 1877.

Such being my view as to the inapplicability of the above-mentioned rule of computation of the period of limitation to the facts of this case, I am further of opinion that the suit falls under No. 143 of the present Limitation Act, and the defendants, having been proved to have broken the conditions of the *ikrar-nama* more than twelve years ago, the suit was rightly dismissed by the Court of first instance as barred by limitation. The Judge in his anxiety to follow a ruling appears to me to have lost sight of the express words of the law, and to have omitted to consider the change which the Legislature has introduced since the precedent relied upon by him was made. I would decree the appeal, and setting aside the decree of the lower appellate Court, restore the decree of the Court of first instance; the plaintiffs-respondents paying all costs in this Court and in the Courts below.

BRODHURST, J.—I concur in decreeing the appeal with costs on the ground that the suit is, for the reasons stated by my learned colleague, barred by limitation.

Before Mr. Justice Straight and Mr. Justice Mahmood.

1882
June 19.

WALI MUHAMMAD (DECREE-HOLDER) *v.* TURAB ALI (JUDGMENT-DEBTOR).

Execution of decree—Decree for sale of immoveable property—Purchase of property by decree-holder's brother—Execution of decree against judgment debtor's person—Equity, justice, and good conscience.

W, the holder of a decree for money, which ordered the sale of certain immoveable property in satisfaction of its amount, applied for execution of the decree, praying for the arrest of the judgment-debtor. *W's* brother had previously purchased such property at a sale in execution of another decree against the judgment-debtor, paying a small amount for it, in consequence of the existence of his brother's decree.

Held that, under these circumstances, applying equity, the decree should in the first place be executed against such property, and not against the person of the judgment-debtor.

THE appellant in this case held a decree for the payment of money against the respondent, which directed the sale of certain immoveable property in satisfaction of the decree. This property was put up for sale in execution of another decree against the respondent, and was purchased by the appellant's brother for a very small amount, owing to the existence of his decree. Subsequently to this purchase the appellant applied for execution of his decree, praying for the arrest of the respondent. The Court of first instance, for reasons which it is not necessary to state, refused the application. On appeal the lower appellate Court affirmed the order of the first Court on the ground that, under the circumstances mentioned above, the decree ought to be executed against the property which it directed to be sold, and which the appellant's brother had purchased, and not against the respondent personally.

On behalf of the appellant it was contended that the lower Court was not competent to put any restriction on the mode in which the decree might be executed.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgment of the Court (STRAIGHT, J. and MAHMOOD, J.) was delivered by

Second Appeal, No. 11 of 1882, from an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 10th December, 1881, affirming an order of Mirza Abid Ali Beg, Subordinate Judge of Farukhabad, dated the 5th September, 1881.

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WALI MUHAMMAD v. PURAB ALI.

STRAIGHT, J.—Looking at all the circumstances of the case, we think that the order of the Judge is an equitable one, in so far as he holds that the decree should be executed first against the mortgaged property, which is in the hands of the decree-holder's brother. We presume he means by this that if such mortgaged property should prove insufficient to satisfy the mortgagee's debt, he will still have the opportunity of proceeding against the person of the judgment-debtor. Holding this view and being of opinion that we are not debarred from applying equitable principles to the questions that arise in proceedings relating to execution of decree, we think the appeal must be dismissed with costs.

Appeal dismissed.

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June 21.

CRIMINAL JURISDICTION.

Before Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* MADHO.

Act XLV of 1860 (*Penal Code*), *s.* 182—*Giving false "information" to a public servant.*

M falsely informed the Collector of a District that certain zamindars had usurped possession of certain land belonging to Government, with the intent "to give trouble to such zamindars, and waste the time of the public authorities." *Held* that, inasmuch as such information was no more than an expression of a private person's belief that the Collector might, if he chose, sustain a civil suit with success against such zamindars, and as, had the Collector agreed with the informant, the result would not have been that he would have used his lawful power as a Collector or as a Magistrate to the injury or annoyance of such zamindars, or that he would have done anything he ought not to have done, *M* had not committed an offence under s. 182 of the Indian Penal Code.

THIS was a reference to the High Court by Mr. G. E. Ward, Magistrate of the Jaunpur District. It appeared that one Madho had preferred a petition to Mr. Ward as Collector, in which he stated that the zamindars of a certain village had taken possession of a market-place belonging to Government, and had caused themselves to be recorded as the proprietors thereof. Mr. Ward instituted an inquiry into the matter, and found that it had been decided some years previously that the property belonged

to the zamindars, and their names had always been recorded as proprietors thereof. Upon this Mr. Ward, observing that the statements of Madho were wholly groundless, and that he could not have been ignorant of the former proceedings in regard to the property, and that he had nevertheless given much trouble to the zamindars and wasted the time of the authorities, ordered that Madho should be charged with an offence under s. 182 of the Indian Penal Code, and the case made over to Mr. D. R. Addis, Joint Magistrate. Mr. Addis was of opinion that there was not evidence sufficient to justify a charge against Madho under s. 182, and declined to issue a summons against him. Mr. Ward, as Magistrate, being of opinion that Madho should at least have been summoned, referred the case to the High Court for orders.

TYRRELL, J.—The Collector was in error in thinking that the penalties of s. 182 of the Indian Penal Code could be applied to the case of a person, giving to the Collector of a District incorrect information that in the informant's opinion the said Collector had a claim on behalf of the State to a market, of which the local zamindars had according to the informant usurped possession. Such "information" was no more than an expression of a private person's belief or opinion that the Collector might if he chose sustain a civil action with success against certain persons. This is not the "information" contemplated by s. 182 and the connected sections of Chapter X. of the Indian Penal Code; nor is the intention of "giving trouble to the zamindars and wasting the time of the public authorities," attributed to the informant by the Collector, the criminal intention contemplated by s. 182. Had the Collector agreed with the informant the result would not have been that he would have used his lawful power as a Collector or as a Magistrate to the injury or annoyance of the zamindars or that he would have done anything he ought not to do. The Collector would have only procured the amendment of his records, and called on the zamindars to renounce baseless pretensions: or he might have laid a civil action against them as the local representative of the Government of the country. Mr. Addis was right in refusing to entertain against the informant of Mr. Ward a criminal complaint under s. 182, Act X of 1872.

P. C.
1882
March 17
and 21.

PRIVY COUNCIL.

THE MUSSOORIE BANK, LIMITED, *v.* ALBERT CHARLES RAYNOR.

[On appeal from the High Court for the North-Western Provinces.]

Construction of will—Precatory words—Misstatement in petition for special leave to appeal—Costs

IN order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain

A testator made a gift in these words: "I give to my dearly beloved wife the whole of my property both real and personal (described), feeling confident that she will act justly to our children in dividing the same when no longer required by her." *Held*, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created.

An order in Council granting leave to appeal is liable at any time to be rescinded with costs, on its appearing that the petition upon which the order has been granted contains any misstatement, or any concealment of facts which ought to have been disclosed. Even if there has been no intention to mislead, a material misstatement having been made, the order is still liable to be rescinded; and, to maintain it, to clear the case of bad faith is not sufficient. *Mohun Lall Sookul* v. *Bebee Doss* (1) referred to and followed.

Of three grounds on which special leave to appeal had been obtained, two had been correctly stated, but with the third was connected error in the petition, to which objection was taken at the hearing. On its appearing that there had been no intention to mislead, the appeal was heard and allowed; but, in regard to the above, without costs. *Ram Sabuk Bose* v. *Monmohini Dossee* (2) referred to.

Appeal from a decree of the High Court, (22nd August, 1878,) reversing a decree of the Subordinate Judge of Dehra Dún, (10th May, 1878).

Two questions were raised on this appeal. The first, preliminary to the hearing, was whether the effect of certain misstatements in a petition of the appellant Bank, for leave to appeal, did not require that an order in Council of 14th August, 1879, granting leave, should be rescinded. The other question was whether, under the will of Captain Raynor, who died at Firozpur in the Panjab on the 13th December, 1860, possessed of shares in the Delhi and London Bank, besides other property, a trust was created for the benefit of his children, or his widow took absolutely. The will is set forth, and the facts are stated, in their Lordships' judgment.

* *Present*: SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) 8 Moo. I. A., 195. (2) 2 L. R., 2 Ind. Ap. 82.

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The widow having obtained possession of the property, and having died in 1875, and having made a will, the present suit was brought by the respondent, the son of the late Captain Raynor, to have set aside an order of attachment, issued in June, 1876, against the above-mentioned Bank shares in the hands of Mrs. Raynor's executors, in execution of a decree obtained against them. The respondent claimed that, under his father's will, a trust, completed by the act of Mrs. Raynor in making a will in their favour, had been created for the benefit of Captain Raynor's children.

The Subordinate Judge dismissed this suit, holding that Mrs. Raynor had taken an absolute interest under the will of Captain Raynor. On appeal, the High Court reversed this decision, on the ground that the will of Captain Raynor constituted Mrs. Raynor a trustee of her husband's estate, for the benefit of his children, empowering her to appoint among them. The judgments of the Judges of the Divisional Bench of the High Court, (Stuart, C. J., and Pearson, J.,) are reported in the Indian Law Reports, 2 Allahabad Series, 55.

The High Court refused leave to appeal to Her Majesty in Council on the ground that the property involved in the suit was no more than Rs. 6,000 in value, and that no doubtful question of law had arisen. Special leave to appeal was thereupon granted by the order in Council dated 14th August, 1879, upon the Bank's petition. It now appeared that some of the statements in that petition were such as to cause confusion between the suit out of which this appeal arose and previous proceedings.

Two suits had been instituted by the Bank against Mrs. Raynor's representatives. In the first of the latter, numbered 41 of 1876, a money-decree, (15th December, 1876), had been obtained against them, and in that suit the attachment above-mentioned had been issued. In the second, numbered 115 of 1876, on a mortgage of land effected by Mrs. Raynor with the Bank, a decree had been obtained by the Bank, declaring its right to sell the interest of Mrs. Raynor to the extent of Rs. 20,000. The petition for special leave to appeal, after stating the institution of the suit on the mortgage, contained the following, in regard to the question of the estate taken by Mrs. Raynor :

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"The High Court of Allahabad, without deciding this question, ordered that the interest of Mrs. Raynor in the properties should be sold in satisfaction of the claim of the Bank under the decree in the above suit. The Bank attached the shares of the Delhi Bank held by Mrs. Raynor's executor and executrix, and the respondent herein objected to such attachment on the same ground as above stated, *viz.*, that Mrs. Raynor possessed only a life interest in the said shares; but his objection was dismissed. He thereupon brought the suit, which is the subject of the present application. The suit was brought in the Court of Small Causes at Dehra, exercising its extraordinary jurisdiction, against the Mussoorie Bank, Limited, and prayed for possession of 24 shares of the Delhi Bank, attached under the above decree in the suit of *The Mussoorie Bank* v. *Executors of Mrs. Raynor*, on the ground that under the will of her deceased husband Mrs. Raynor held them only for her own life, and in trust after her death for her children. The suit was valued at Rs. 6,000, and was numbered 24 of 1877."

Mr. *J. Graham*, Q C., and Mr. *J. T. Woodroffe* appeared for the appellant,

Mr. *R. V. Doyne*, for the respondent.

On the objection that the above statements in the petition, as well as others, were calculated to mislead; inasmuch as the present suit was brought to set aside an order made in 1876, more than a year before the date of the decision which had been represented as affording the ground of the relief sought, Mr. *R. V. Doyne* was heard. He referred to *Ram Sahuk Bose* v. *Monmohini Dossee* (1) and contended that the order granting special leave to appeal should be rescinded.

The suit under appeal was brought to set aside an order made in the suit 41 of 1876, and the statement in the petition as to the connection between the suit 115 of of 1876 and the present suit was such as to conceal the real state of the case. Whether this was intentional or not the result would be the same There was no ground for concluding that the leave to appeal would have been granted had the true statement been made; and therefore the order granting it must now be rescinded.

(1) L. R, 2 Ind. Ap. 82.

Mr. *J. Graham*, Q. C., for the appellant, argued that there were grounds, apart from the inaccuracies of the petition, which contained no intentional misstatement, on which the order for leave to appeal could be maintained. Affidavits had been filed to explain how the error in the petition had arisen. The misstatements were, in a certain sense, immaterial; for on the merits the appellant Bank was entitled to the leave granted.

Mr. *R. V. Doyne* replied.

Their Lordships decided that the appeal should be heard.

For the appellant it was argued that Mrs. Raynor had taken an absolute interest, under her husband's will, unaffected by a trust in favour of the children. The Chief Justice had referred in his judgment to the law of precatory trusts as applied in *Curnick* v. *Tucker* (1). In that case the testator appointed his wife sole executrix and left to her all his property, "for her sole use and benefit, in the full confidence that she would so dispose of it amongst all their children during her lifetime and at her decease, doing equal justice to all of them." It was decided that she took a life interest, with a power of appointment amongst the children; and the previous case of *Lamb* v. *Eames* (2) was distinguished. This latter was it was submitted nearer the present. In it, a testator devised to his wife his property, "to be at her disposal in any way she may think fit for the benefit of herself and family." This was held to be an absolute gift to the widow. In *In re Hutchinson and Tenant* (3), where all the property was given to the wife, absolutely, with full power to her to dispose of the same, as she might think fit, for the benefit of the testator's family, it was held that she took the entire estate. In *Parnall* v. *Parnall* (4) a testator gave his wife the whole of his real and personal property for her sole use and benefit, and added—"It is my wish that whatever property my wife might possess at her death be equally divided between my children." In this there was held to be no precatory trust, and the widow took absolutely. In *Stead* v. *Mellor* (5) a trust for such of the testatrix's nieces as should be living at her death, her desire being that they should distribute such residue as

(1) L. R. 17 Eq., 320.
(2) L. R. 10 Eq., 267; on appeal, L. R., 6 Chanc. App., 601.
(3) L. R. 8 Ch. D. 540.
(4) L. R. 9 Ch. D. 97.
(5) L. R. 5 Ch. D. 225.

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they might think would be most agreeable to her wishes, was held to confer upon the nieces an estate for their own benefit. *Sale* v. *Moore* (1) was also referred to.

For the respondent it was argued that the Bank shares, which had been treated by both the Courts below as part of Captain Raynor's estate, and as passing under his will, were not liable to be sold in execution of a decree obtained against the widow. Though the tendency of recent decisions had been against the lax recognition of words as creating precatory trusts, the doctrine in regard to the latter had not been altogether set aside.

It was stated in *Knight* v. *Knight* (2) that, as a general rule, where property was given absolutely to any person, and the same person was, by the giver, who had power to command, recommended or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty or wish was held to create a trust; subject to this, that (i) the words were so used that upon the whole they ought to be construed as imperative; (ii) the subject of the gift over was certain; (iii) the persons intended to receive the benefit were certain.

The true effect of the disputed clause in the will was that the testator gave to his widow the right of enjoyment for her life, with a power of appointment to be executed in a prescribed mode, *viz.*, justly, among the children. Thus, both subject and object were clear. *Hutchinson and Tenant* (3) was distinguishable, and *Curnick* v. *Tucker* (4) had not been over-ruled. The latter case and *Le Marchant* v. *Le Marchant* (5) were authority for the judgment of the Court below. *Briggs* v. *Penny* (6) was also referred to.

The appellant was not called upon to reply.

Their Lordship's judgment was delivered by

SIR A. HOBHOUSE.—In this case their Lordships have felt almost more difficulty in deciding whether or not to hear the appeal than they have in disposing of it when heard, and in order to show the nature of that difficulty it is necessary to state the precise course which this litigation has taken.

(1) 1 Simon, 334.
(2) 3 Beavan, 48; 11 Cl. and Fin. 513.
(3) L. R. 8 Ch. D. 540.
(4) L. R. 17 Eq. 320.
(5) L. R. 18 Eq. 414.
(6) 3 Macnaghten and Gordon, 547.

In the month of December, 1860, Captain William Raynor died, having left a will which he expressed in the following terms:—"I give to my dearly beloved wife, Mary Anne Raynor, the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur, No 50, together with all my plate and plated ware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." And he appointed his son William Joseph Raynor, and his wife Mary Anne Raynor, to be his executors. Mrs. Raynor alone proved the will.

During her lifetime no question arose as to the true nature of Captain Raynor's will. It appears that she possessed herself of his property, and she assumed to deal with it as though it were her own. On the 5th September, 1868, Mrs. Raynor made her will by which she gave to her son Albert Charles Raynor, who is the respondent in this appeal, "24 of my shares in the Delhi and London Bank," and she also gave him a house and some land. Other property, consisting mainly of houses and land and of Government rupee paper, she gave partly to her daughter Adelaide Louisa Swetenham, partly to her son William Joseph Raynor, and partly to her step-daughter Elizabeth Golding. To the latter was given the house No. 50 at Firozpur, which the testatrix describes as "my house and estate." Mrs. Raynor died some time in 1875, and her will was proved, it does not appear by whom.

In the year 1876 the Mussoorie Bank, who are the appellants, instituted two suits against Mrs. Raynor's executors for the purpose of recovering the sum of Rs. 25,000 advanced by the Bank to Mrs. Raynor upon the security of 30 Delhi Bank shares and of certain houses. One of these suits, No. 41 of 1876, was instituted in the Small Cause Court at Dehra Dún, and on the 5th December, 1876, the Bank obtained a decree under which the 30 shares were attached. The other suit, number 115 of 1876, instituted before the Subordinate Judge of Dehra Dún, was to enforce the Bank's mortgage upon the houses. On the 12th December, 1876, the Bank obtained

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a money-decree for the sum of Rs. 32,121-2-4, but the Subordinate Judge refused to give them any specific relief on the basis of the mortgage. His principal reason appears to have been that the nature and extent of Mrs. Raynor's interest in the mortgaged properties was uncertain.

Against this decision the Bank appealed to the High Court, who gave judgment on the 2nd of January, 1878. They held that Mrs. Raynor certainly had some interest in the properties she mortgaged to the Bank; that she might have had an absolute interest in them, especially as she had acquired them after Captain Raynor's death; and that the Bank was entitled to enforce its security against whatever interests might ultimately prove to be hers. They varied the decree accordingly. As regards the interest which Mrs. Raynor had in the properties the High Court pronounced no opinion, holding, quite rightly as their Lordships think, that the question did not arise in a suit in which Captain Raynor's estate was not properly represented.

While the appeal in the mortgage suit was pending, Albert Raynor brought the present suit for the purpose of setting aside the order of the 5th of December, 1876, so far as regards the 24 bank shares bequeathed to him by his mother, and of obtaining possession of those shares. The identity of the shares with the shares bequeathed by Captain Raynor may be assumed for the present purpose; and the case made by the respondent is that Mrs. Raynor took only a life-interest in her husband's property. On the 10th of May, 1878, the Subordinate Judge dismissed the suit, holding that Mrs. Raynor took an absolute interest under her husband's will. Albert Raynor appealed, and on the 22nd of August, 1878, the High Court gave him a decree on the ground that Mrs. Raynor held her husband's estate, not absolutely in her own right, but as trustee for their children, with a power of appointment among them.

The Bank then applied to the High Court for leave to appeal against this decree. On the 13th of January, 1878, the High Court refused leave on the ground that the property at stake in this suit was valued at no more than Rs. 6,000, and that the question of law was so clear that an appeal could only result in the affirmance of the judgment.

The Bank then presented a petition to Her Majesty in Council for leave to appeal, on which leave was granted by an order in Council, dated the 14th August, 1879. And it is the frame of that petition that gives rise to the preliminary question now raised. Waiving all questions as to the honesty of the petitioners, the respondent's counsel insists that in fact their petition is so framed as to mislead this Board, and to bring it to a favourable decision on false grounds.

The petition states the petitioners' mortgage suit, number 115 of 1876, and it states the effect of the decree of the High Court therein; but it does not give the date of that decree. Then it goes on to state that under that decree the Bank shares were attached; that Albert Raynor objected; that his objection was overruled; and that thereupon he brought the present suit. The proceedings in the present suit are correctly stated; but it is not true that the Bank shares were attached under the decree in the mortgage suit, or that Albert Raynor's objection and suit directly struck at any portion of the decree in the mortgage suit. The shares were attached in the suit relating to them alone, which was valued at Rs. 6,000 only; whereas the mortgage suit was of greater value.

The first question is, whether the preliminary objection is taken too late. The order was made more than two years ago, and the respondents were fully aware of it; yet no objection was made until all the costs of the appeal had been incurred. As a general rule, the proper course, in a case like the present, is for the respondent to move as early as possible to rescind the order in Council; and their Lordships think it right to call attention to the opinion expressed in the second volume of the Law Reports, Indian Appeals, page 82. It is there said, "In their Lordships' opinion an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason, that if the leave to appeal is on that ground rescinded, no further costs are incurred: and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred." At the same time their Lordships desire it to be distinctly understood that an order in Council granting leave to appeal is liable at any time to be

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rescinded with costs, if it appear that the petition upon which the order was granted contains any misstatement, or any concealment of facts which ought to be disclosed.

In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. The appellants' solicitor has filed an affidavit showing how he confused the decree of the 12th of December made in the mortgage suit, with the decree of the 5th of December under which the shares were attached; and it appears that he did not leave the judgment of the 12th of December to be explained solely by the petition, because a copy of it was among the papers put in with the petition. Still if there has been a material misstatement, it is not sufficient to clear the case of bad faith. To use the words of Lord Kingsdown (1), "Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if this Court has been induced to make an order to which, if the facts were fully before it, it would not, or might not, have been induced to make." Their Lordships therefore proceed to ask whether the order in question was one which they might not have been induced to make if the facts had been fully and truly stated.

The grounds which the petitioner relies on as reasons why an appeal shall be allowed, notwithstanding the value of the suit is only Rs. 6,000, are three in number: first, that the decision virtually affects the right of the Bank to have a mortgage security for the whole sum of Rs. 32,000 odd; secondly, that the point of law decided by the High Court will cover other claims arising in reference to the estate of Mrs. Raynor; and thirdly, that the decision on appeal in this suit will probably prevent any appeal against the decree in the mortgage suit or against the proceedings in execution thereof. Their Lordships consider that the first two grounds are solid grounds for granting the leave asked; and they are not at all affected by the error in the petition. It is clear that if Mrs. Raynor took only a life-interest in her husband's property,

(1) *Mohun Lall Sookul* v. *Bebee Dossee*, 8 Moo. I. A., 195.

the Bank cannot enforce their decree against any portion of the property enjoyed by her in her lifetime, whether comprised in the mortgage or not, unless they successfully contest against the Raynor family, as to each such portion, the question whether or no it belonged to Captain Raynor or was purchased with his assets. The third ground is affected by the misstatements in the petition; first, because the date of the decree in the mortgage suit is not given, and therefore it does not appear on the face of the petition that the time for appealing had, as in fact it had, then expired; secondly, because the decree obtained by Albert Raynor appears to be more directly mixed up with the mortgage suit, when it is stated that the shares were attached under that very decree, than when they are shown to be attached under a decree in a different suit. Still there is a sense in which the third ground may be explained. It is impossible to suppose that, after the decision of the High Court in this suit, any effectual proceeding could be taken by way of simple execution of the decree in the mortgage suit, for all purchasers would be deterred by the knowledge that they were buying a formidable litigation. It certainly would be necessary for the Bank to frame a new suit properly constituted for the purpose of contesting all questions with the Raynor family and seeking execution of their decree against them. In such a suit as that, the construction of the will might, and probably would, be brought by appeal before this Board. And it might possibly, though probably it would not, be found necessary for properly working an appeal in a subsidiary suit of that kind to obtain leave to appeal from the original decree the execution of which was being prosecuted.

Their Lordships are of opinion that the petition is very faulty, and that due care was not shown in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed. Their Lordships also were, when hearing the preliminary objection, strongly impressed with the circumstance that there was *primâ facie* strong ground for an appeal upon the merits. For these reasons they have thought it right to hear the appeal.

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THE MUSSOORIE BANK v. ALBERT CHARLES RAYNOR.

Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice James in the case of *Lambe v. Eames*, and by Sir George Jessel in the case of *Re Hutchinson and Tenant*. They are further of opinion, that if the doctrine of precatory trusts were applied to the present case, it would be extended far beyond the limits to which any previous case has gone. No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative words.

In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well-known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void notwith-

standing that the most direct and precise words of gift over might be used. Their Lordships think that substantially the words "when no longer required by her" must in this will be taken to have the same meaning as if he had said, "I give to my children so much as is not required by her." Considering the nature of the property, which includes a number of articles as to some of which the use is equivalent to the consumption; to the nature of the first gift, which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their Lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. That is equivalent to an absolute gift to the wife.

They do not think it necessary therefore to enter into a consideration of the various authorities which have been cited as to the application of the doctrine of precatory trusts, or nicely to weigh one authority against another. They consider it sufficient to say that upon this will the wife took an absolute interest, and that to apply the doctrine of precatory trusts to it would be a very large extension of that doctrine.

The result is, that their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to substitute for it a decree dismissing the appeal to the High Court with costs; but with respect to the costs of the present appeal they think it right to follow the case, from which a citation has already been made, in the second volume of the Law Reports, Indian Appeals, of *Ram Sabuk Bose* v. *Monmohun Dossee*; and having regard to the nature of the petition presented for leave to appeal, and the course pursued by the appellants, they will give no costs of the appeal. The money which has been deposited will be returned to the appellants.

Solicitors for the appellants: Messrs *W. Carpenter and Sons.*

Solicitors for the respondent: Messrs *Watkins and Lattey.*

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June 3.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SURJU PRASAD SINGH (PLAINTIFF) *v.* KHWAHISH ALI (DEFENDANT).*

Act XV of 1877 (*Limitation Act*), *s.* 8—*Joint Hindu family—Debt due to family —Joint creditors.*

The manager of a joint Hindu family, of which *S* was a minor member, lent money on behalf of the family to *K*. The time limited by law for a suit for such money was three years from the date of the loan. During that period there were several members of the family who were *sui juris*. After attaining his age of majority *S* sued *K* for such money, and as the period limited by law for such suit had expired, relied on the saving provisions of s. 8 of the Limitation Act, 1877.

Held that, although during such period *S* was one of several joint creditors who was under a disability, yet as more than one member of the family could have given a discharge to *K* without *S's* concurrence, such provisions of s. 8 of the Limitation Act were not applicable, and *S's* suit was therefore barred by limitation.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal* and Shah *Asad Ali*, for the appellant.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court (BRODHURST, J. and TYRRELL, J.) was delivered by

TYRRELL, J.—The appellant, Surju Prasad Singh, a member of a locally important family in the Azamgarh district, sued the respondent, Khwahish Ali, an old client of the plaintiff's house of business, for a balance due on an account beginning in Magh Sambat 1925 and ending with 12th Aghan Badi Sambat 1928. The latter Sambat year corresponded with 22nd March, 1871, to 22nd March, 1872. In the course of that year a separation of the members of the plaintiff's family is now alleged by the plaintiff to have taken place, but as a matter of fact it is in evidence, and has been admitted on more than one occasion by the members of the family, including the plaintiff, that though the harmony of the joint family had been previously impaired, the joint *status* subsisted intact throughout the lifetime of Kewal Singh, who was the universally acknowledged "head and manager" of the joint family, and that it was not till

* First Appeal, No. 139 of 1881, from a deree of Pandit Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 1st September, 1881.

the month of June, 1872 (Sambat 1929), that all the members of the family agreed to refer to an arbitrator the task of effecting a partition among them. This partition was formally and efficiently accomplished in May, 1873 (Sambat 1930). Apart from the recitations of fact and the allegations of the members of the family on this subject as set out at length in the award of arbitration, some at least of which are probably open to the imputation of inaccuracy, it is instructive to note the distinct pleadings and assertions of the present plaintiff made in the Court of the Subordinate Judge of Azamgarh in 1879 in his suit for his partitioned share against his cousins Fateh Singh and Lachman Singh. In that year the plaintiff was more than eighteen years of age; and though under the peculiar circumstances of his nonage he was found to be then disqualified to sue, it by no means follows that he was incompetent to testify; and the averments we are about to notice were then made by him and duly verified. In the plaint of that suit the appellant before us affirmed that "Kewal Singh was the leading member and manager of the joint family till his death,"—which seems to have taken place late in 1871 (Sambat 1928),—"when he died disputes and quarrels arose among the family members; and finally Muhammad Ikram pleader was appointed an arbitrator. He made an award dated the 1st May, 1873. When the award was passed and since that period continuously up to September, 1877, the plaintiff was a minor. Notwithstanding a certificate of guardianship having been obtained by the plaintiff's mother, and paper proceedings running in her name, still the parties remained actually in commensality and mutual agreement. The plaintiff's mother being a secluded lady, and there having been no male member fit to manage, all the affairs and management of making collections in the estate and money dealings remained wholly in the hands of the defendants (Fateh Singh and Lachman Singh), who managed and collected and dealt in moneys in every way, both parties continuing to live and mess jointly. In October, 1877, the plaintiff attaining majority asked the defendants to adjust with him the accounts of the landed estate and the money dealings and to render to him the account-books, and the deeds relating thereto: but the defendants showed bad faith, which finally led to a separation and criminal proceedings;" and eventually to that civil action. The questions then and thus at issue between the parties were determined

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SURJU PRASAD SINGH v. KHWAHISH ALI.

by arbitration as follows :—" Subsequently to the award made by Muhammad Ikram (1873) the parties continued joint in business and food up to the end of 1284 fasli (September 1877,) but all the proceeds of the estate were applied to the payment of the Government revenue and the expenses of servants, Court, &c, under the management of Fateh Singh. Only the sum of Rs. 1,000, which Fateh Singh realized from Farzand Ali, is due to the plaintiff as his share of that decree money." It remains for us to apply this ascertained state of facts to the case before us with reference to the main plea of limitation which alone has been argued seriously at the hearing. The appellant's suit is for money payable by the defendant for money lent to him, and the three years period provided for such a suit by art. 57, sch. ii of Act XV of 1877, began to run from the date when the loans were made. The latest item of loan in the account is Rs. 150 lent on or about the 24th August, 1871. It is true that the account credits the debtor with a payment (Rs. 700) made on the 9th December, 1871 : but this would have no effect on the starting point of limitation, for there is nothing to show that the payment was made " for interest as such " by the payer, and it cannot be regarded as " part-payment of the principal of the debt," as the fact of the payment does not appear in the handwriting of the person making the same,—s. 20, Act XV of 1877.

Now it is certain that in 1871 and thereafter to the middle of 1873 the whole family of the plaintiff was joint and undivided in its legal *status* and competency; and that subsequently to the later date the plaintiff and his first cousins the sons of Sheoambar Singh, who were then *sui juris*, were joint and undivided *inter se*. It follows therefore that throughout all this period the plaintiff was a disabled joint creditor among several other joint creditors, more than one of whom could have given without the plaintiff's concurrence a discharge to the debtor, the respondent here, for a part or the whole of the debts the subject of the present suit ; and that therefore under the terms of s. 8, Act XV of 1877, the time to sue for the same ran against them all, and was not affected by any subsequent disability or inability in its course. In this view of the facts and of the law to be applied to them we unhesitatingly affirm the finding of the Court below that the appellant's suit is barred

by limitation. The two other pleas refer to the question of the effect of the provisions of s. 115 of the Indian Evidence Act on a pleading made in the name of the plaintiff's guardian in a former suit brought by her on his behalf. But they do not call for consideration as the pleader of the respondent admitted that he was not concerned with supporting the extreme view of the Court of first instance; and the suit being barred by statute it is needless to go into subsidiary questions of law or procedure. We dismiss the appeal with costs.

Appeal dismissed.

CIVIL JURISDICTION.

1882
June 8.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAM PRASAD AND OTHERS (DEFENDANTS) *v.* DINA KUAR (PLAINTIFF).*

Landholder and tenant—Partition—Sir-land—Determination of rent of ex-proprietary tenant—Suit for damages for use and occupation of land—Act XII of 1881 *(N-W.P. Rent Act), ss.* 14, 95 *(l)—Act XIX of* 1873 *(N.-W.P. Land-Revenue Act), s.* 125.

A co-sharer, in whose mahal, assigned on partition, sir-land belonging to another co-sharer had been included, without having applied to the Revenue Court to have the rent of the latter in respect of such sir-land determined, under s. 95 (*l*) of Act XII of 1881, sued the latter in the Civil Court for damages for the use and occupation of such sir-land, "without obtaining a lease or having the rent fixed." *Held*, following the principle laid down in S. A. No. 914 of 1879 (1), that such suit was not maintainable.

Sir-land of one sharer included on partition in the mahal assigned to another sharer is to be treated in the same way as sir-land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of ex-proprietary tenancy comes by force of law into existence.

The words "may apply" in s. 14 of Act XII of 1881 mean "shall apply," if the landholder wants to procure such a determination of his tenant's rent, as would give him a title to sue his tenant under that Act for arrears of rent, and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like.

THE plaintiff in this case, who had, by virtue of a partition of a certain mahal of which she and the defendants were co-sharers, become the proprietor of certain land which at the time of partition

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* Application, No. 13 of 1882, for revision under s. 622 of Act X of 1877 of a decree of Maulvi Muhammad Majid Khan, Subordinate Judge of Ghâzipur, dated the 21st December, 1880.

(1) Unreported.

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was sir-land belonging to the defendants, sued them for Rs. 189, damages for the use and occupation of the land in the year 1285 fasli without obtaining a lease or having the rent fixed. The suit was instituted in the Court of the Munsif of Rasra, zila Balia, who gave the plaintiff a decree for Rs. 31 odd. On appeal the defendants contended that the Munsif had no jurisdiction to entertain the suit, as it was exclusively cognizable in the Revenue Courts, the parties to the suit standing in the relation of landlord and tenant. The appellate Court disallowed this contention on the ground that the suit being one for damages was cognizable in the Civil Courts.

The defendants applied to the High Court to revise the decrees of the lower Courts, contending that the suit was virtually one for rent, and was therefore exclusively cognizable in the Revenue Courts.

Mr. *Conlan*, for the defendants.

Lala *Lalta Prasad*, for the plaintiff.

The judgment of the Court (STUART, C. J., and TYRRELL, J.) was delivered by

TYRRELL, J.—It has been found as a fact in this case that the plaintiff Dina Kuar is now by virtue of a partition the proprietor of the land mentioned in the plaint, of which the defendants had been the sir-holders previous to partition.

It has also been rightly held that "a sir-holding which under a partition falls to the land of another shareholder is to be treated in the same way as sir-land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of ex-proprietary tenancy comes by force of law into existence." The defendants then are and ever since the partition have been the ex-proprietary tenants of the plaintiff in respect of the land in question. The only question then raised before us in this petition is whether the plaintiff was justified in bringing an action in the Civil Court against her ex-proprietary tenants for damages on the allegation that they had illegally cultivated the land and appropriated its produce. We are of opinion that such a suit was not maintainable.

By the second clause of s. 125 of Act XIX of 1873 it is enacted that "if sir-land belonging to a co-sharer become included on par-

tition in the mahal assigned to another co-sharer, and after partition such original co-sharer continue to cultivate it, he shall be an occupancy-tenant of such land and his rent *shall be fixed* by order of the Collector of the District or of the Assistant Collector." Again, we find in s. 14, Act XVIII of 1873 (now XII of 1881) that "where the rent of any ex-proprietary tenant has not been fixed by order of a settlement officer under Act XIX of 1873, or by an order under this Act, the landholder may apply to determine the rent of such tenant as if he were an occupancy-tenant &c." Such an application would be the application (*l*) of s. 95 of Act XVIII of 1873 (XII of 1881) and could be entertained by a Court of Revenue alone under the mandatory terms of that section. It may be said that the terms of s. 14 cited above—"the landholder may apply"—are permissive or discretionary only, and that they do not operate to restrict him to this remedy. But it has been ruled by a Bench of this Court in S. A 914 of 1879 (1) that under circumstances where a *quondam* proprietor retains cultivatory rights in land once his sir "no suit for arrears of rent can legally lie until the rent rate on the land has been judicially determined by a competent Court: the plaintiff (zamindar) therefore, until he has filed an application under s. 95 of the Rent Act, has no *locus standi* in a suit for recovering arrears of rent said to be due from the ex-proprietary tenant." This principle, which we approve and follow, will apply with increased force to a suit such as that now before us, in which the newly invested proprietor, without taking any of the steps by law provided for ascertainment, determination, and record of the rent properly exigible from the ex-proprietary, *i. e.*, "occupancy-tenant," in the sense of s. 14, drags him into a Civil Court with a claim for damages, as against a wrong-doer or trespasser. We read the words "may apply" of s. 14 as meaning "shall apply" if the landholder wants to procure such a determination of his tenant's rent as would give him a title to sue his tenant under the Rent Act for arrears of the same; and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like. The law does not say "shall apply," for such a phrase would exclude the possibility of private settlement, or of a remission of his

(1) Unreported.

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claim to rent, if the landholder were minded to waive his claim in favour of a relation, or friend, or valued servant.

We allow this application and set aside as made without jurisdiction the decrees of the Courts below with costs.

Application allowed.

1882 *June 8.*

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

ALI HASAN AND ANOTHER (DEFENDANTS) v. DHIRJA (PLAINTIFF)*

Mortgage—Condition against alienation—First and second mortgagees—Purchase by mortgagee of mortgaged property.

A transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and, with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee. *Chunni* v. *Thakur Das* (1); *Mul Chand* v. *Balgobind* (2); and *Lachmin Narain* v. *Koteshar Nath* (3) observed on.

A mortgage is not extinguished by the purchase of the mortgaged property by the mortgagee, but subsists after the purchase, when it is the manifest intention of the mortgagee to keep the mortgage alive, or it is for his benefit to do so. *Gaya Prasad* v. *Salik Prasad* (4) and *Ramu Naikan* v. *Subbaraya Mudali* (5) followed.

It is not absolutely necessary for the first mortgagee of property, when suing to enforce his mortgage, to make the second mortgagee a party to the suit. If the second mortgagee is not made a party to the suit, he is not bound by the decree which the first mortgagee may obtain for the sale of the property, but can redeem the property before it is sold; but if he does not redeem, and the property is sold in execution of the decree, his mortgage will be defeated, unless he can show some fraud or collusion which would entitle him to defeat the first mortgage or to have it postponed to his own. The ruling of TURNER, J. in *Khub Chand* v. *Kalian Das* (6) followed.

In July, 1874, a usufructuary mortgage of certain immoveable property was made to *D*. In July, 1875, a portion of such property was again mortgaged to *D*. The instrument of mortgage on this occasion contained a condition against alienation. In July, 1877, the whole property was mortgaged to *N*. In October, 1877, it was again mortgaged to *D*. *N* sued the mortgagor on his mortgage in July, 1877, and on the 29th September, 1879, obtained a decree against him for the sale of the property. In October, 1879, the mortgagor sold the property

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* Second Appeal, No 1275 of 1881, from a decree of R. J. Leeds, Esq, Judge of Gorakhpur, dated the 5th August, 1881, modifying a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 13th April, 1881.

(1) I. L. R, 1 All. 126.
(2) I. L. R, 1 All. 610.
(3) I. L. R., 2 All. 826.
(4) I. L. R., 3 All. 682.
(5) 7 Mad. H. C. R., 229.
(6) I. L. R., 1 All. 240.

to *D* in satisfaction of his mortgages of July 1875 and October 1877. *D* did not offer to redeem *N's* mortgage, and on the 20th November, 1880, the property was put up for sale in execution of *N's* decree, (*D's* objection to the sale having been previously disallowed), and was purchased by *A*. *D*, who was still in possession under his mortgage of July 1874, then sued *A* for a declaration of his proprietary right to the property, claiming by virtue of his mortgages and the sale of October 1879.

Held, applying the rules stated above, that *N's* mortgage of July 1877 could not affect *D's* right under his mortgage of July 1875, but *N* took subject to such mortgage; nor could the auction-sale of the 20th November, 1880, which took place in enforcement of *N's* mortgage, affect *D's* prior mortgages; and therefore the condition against alienation made in *D's* favour had no prejudicial effect on the right of *A* under his auction-purchase.

That the purchase by *D* of October 1879 did not extinguish his prior mortgages, but such mortgages were still subsisting, and *A* purchased subject to them

That, there having been no fraud or collusion on *N's* part, *A* must be held to have purchased subject only to *D's* prior mortgages and not subject to *D's* mortgage of October 1877.

Held also that, as *D's* purchase of October, 1879, was made without *N* having had an opportunity of redeeming *D's* prior mortgages, *D's* purchase was subject to *N's* mortgage of July 1877, and therefore could not deprive *A* of what he had purchased at the auction-sale of the 20th November, 1880.

Held, therefore, that all the relief that *D* was entitled to was a declaration that, as prior mortgagee under the mortgages of July 1874 and July 1875, he was entitled, as against *A*, to retain possession of the property, until such mortgages were satisfied

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

Maulvi *Mehdi Hasan*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

The Court (TYRRELL, J. and MAHMOOD, J.) delivered the following judgments:—

MAHMOOD, J.—The facts of this case may be recapitulated to elucidate the points of law which arise from them and require decision in disposing of this appeal and the objections taken by the respondent under s. 561, Civil Procedure Code.

Hubdar Singh and Subdar Singh, two brothers, owned a two annas six pies share in mauza Dhidya which they mortgaged along with their share in another village to Dhirja (plaintiff) in lieu

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of Rs. 799 on the 7th July, 1874. The nature of the mortgage was usufructuary, and the mortgagee was therefore placed in possession. On the 17th July, 1875, Hubdar Singh alone borrowed some more money from Dhirja and executed a bond hypothecating a one anna share in the said village Dhidya. The deed contains a covenant against future alienation, so long as the mortgage-debt secured by the deed remained unpaid. On the 15th July, 1877, the said Hubdar Singh borrowed some money from one Niamat, and as security for the loan executed a bond in his favour hypothecating a two annas four pies share in the same village. Niamat has been found to have taken the mortgage with notice of the previous incumbrances. Again, on the 20th October, 1877, Hubdar Singh borrowed some money from Dhirja, the first mortgagee, and as security for the loan hypothecated the two annas four pies share which had been mortgaged to Niamat.

Considering that the first mortgage of 1874 in favour of Dhirja was executed by Hubdar jointly with his brother, and that the former mortgaged only a one anna share under the deed of 1875, it does not appear how he subsequently dealt with a two anna four pies share, as he did in executing the deed of 15th January, 1877, in favour of Niamat, and the deed of 20th October, 1877, in favour of Dhirja. This point however is not in issue between the parties and may be dismissed from the mind.

Niamat brought a suit against Hubdar Singh alone, on the hypothecation-bond of 15th July, 1877, and on the 29th September, 1879, obtained a decree for recovery of the money due under the bond by enforcement of lien against the two annas four pies share to which the deed related.

Before the property could be sold in pursuance of the decree Hubdar Singh, on the 2nd October, 1879, (erroneously stated by the Judge to be 2nd September, 1879) executed a deed of sale in favour of the first mortgagee Dhirja, whereby he conveyed a two annas share (out of the mortgaged share) in Dhidya together with some other property (not in suit) for a consideration of Rs. 1,700, of which Rs. 1,200 represented the consideration for the two annas share in Dhidya. It has been found and is not disputed

that this sum of Rs. 1,200, the price of the two annas share in Dhidya, consisted of the following items:—

(1) On the mortgage-deed of 7th July, 1874, said to be *interest* on the principal mortgage-money	Rs.	240
(2) Principal and interest due on the deed of 17th July, 1875	"	806
(3) Principal and interest due on the deed of 20th October, 1877		
(4) On account of grain, &c.	"	154
	Rs.	1,200

Thus by the operation of the sale-deed the hypothecation-bonds of 17th July, 1875, and of 20th October, 1877, were paid off, but the usufructuary mortgage of 7th July, 1874, remained unpaid, and the mortgagee-purchaser Dhirja continued and is still in possession.

During the proceedings taken by Niamat to execute his decree of 29th September, 1879, Dhirja, apparently relying on his sale-deed, objected to the sale of the property, but his objections were disallowed on the 25th September, 1880, and on the 20th November, 1880, the two annas four pies share in Dhidya (covered by Niamat's hypothecation-bond of 15th July, 1877) was sold in pursuance of the decree, and purchased by the third set of defendants who appear as appellants in this Court.

Thereupon Dhirja brought the suit from which this appeal has arisen, and although the prayer in the plaint is somewhat diffusely expressed, the substantial object of the suit was to obtain a declaration of proprietary right and possession in respect of the two annas share purchased by the plaintiff, being the two annas share included in the two annas four pies share purchased by the defendants-appellants at the auction-sale of the 20th November, 1880. The plaintiff based his title on the priority of lien which the mortgages created in his favour, and on the sale-deed obtained by him on the 2nd October, 1879, his contention being that the purchase by him did not operate to divest him of the priority of lien which he possessed under his mortgages.

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The whole contention therefore lies between the rights of the plaintiff under the sale-deed of 2nd October, 1879, and the mortgages held by him on the one hand, and the rights of the defendants-appellants under the purchase of the 20th November, 1880, (taken together with the hypothecation-bond of 15th July, 1877, and decree of the 29th September, 1879) on the other hand.

The Subordinate Judge dismissed the suit on the somewhat inconsistent grounds that the plaintiff's sale-deed of 2nd October, 1879, was fraudulent and collusive, and therefore invalid; and that yet it operated to extinguish the mortgages held by the plaintiff.

The Judge in modifying the decree of the Subordinate Judge has held that "the plaintiff is entitled to a declaration of his superior lien on the two annas share in Dhidya by virtue of his prior mortgages, to confirmation of his possession as vendee in respect to the remaining anna, and to the cancelment of so much of the bond of 15th July, 1877, the decree of the 29th September, 1879, the miscellaneous order of the 25th September, 1880, and the auction sale of 20th November, 1880, as relate to the one anna share lawfully transferred by the conveyance of 2nd September, 1879" (*sic*, the date should be 2nd October, 1879.)

From this decree the defendants purchasers of the two annas four pies share have preferred this appeal; and the plaintiff-respondent has filed cross objections under s. 561 of the Civil Procedure Code. The appeal impugns the Judge's decree on all points; whilst the respondent's objections raise the contention that he is entitled to absolute proprietary possession of the entire two annas share in dispute. The effect of the appeal and the objections is to render the entire two annas share subject to adjudication by this Court. Both the appeal and the respondent's objections can be conveniently considered together.

There are important points in this case which I consider it desirable to settle before entering upon the main questions on which the decision of the appeal depends. Relying on the ruling of this Court in *Chunni* v. *Thakur Das* (1), which was followed in *Mul Chand* v. *Balgobind* (2), the Judge has held, giving effect to the covenant against alienation contained in the hypothecation-deed of

(1) I. L. R., 1 All. 126 (2) I. L. R., 1 All. 610

17th July, 1875 (which related only to a one anna share), that "the plaintiff is entitled to have the bond of the 15th July, 1877, and the auction-sale of the 20th November, 1880, declared invalid to the extent of one anna out of the two annas four pies transferred thereby." Before expressing my opinion upon the point, I may say that the same question was touched upon in the judgment of this Court in a more recent case—*Lachmin Narain* v. *Koteshar Nath* (1). I am of opinion that the view of this rule of law taken by the Judge is erroneous, and not warranted by the precedents on which he has relied or the one which I have mentioned. Those precedents only go to show that an alienation in contravention of a covenant in the mortgage-deed not to alienate the mortgaged property so long as the mortgage is subsisting is not absolutely void, but voidable only so far as it goes to defeat the mortgage's rights under the mortgage. But in the present case the subsequent hypothecation could not operate *per se* to defeat the rights of the plaintiff under the hypothecation-bond of 17th July, 1875, in which the covenant against alienation is contained. Such covenants are obtained by mortgagees in this country, often with the sole object of disabling the mortgagor from the right to redeem the property by raising money on its security on less onerous terms. Whilst Courts of Justice will give effect to the private agreements of the parties, they decline to give their aid in enforcing oppressive stipulations which do not really form part of the transaction and go beyond the whole object of the contract. In my opinion some analogy exists between stipulations of this kind and stipulations for penalties against which Courts of Equity give relief. "There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to

(1) I. L. R., 2 All., 826.

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avail himself of it for the purpose of injustice, or fraud, or oppression, or harsh and vindictive injury" (Story's Eq. Jur., s. 1316). In my judgment this doctrine, so consonant with the rule of "justice, equity and good conscience," which the Courts in India are bound to administer, is fully applicable to covenants of the nature now under consideration. And whilst recognizing the authority of the rulings of this Court above referred to, I hold that they do not go to the extent of showing that a mortgagee, having the benefit of a covenant against alienation, can employ it, so as to deprive the mortgagor of the power of dealing with his rights consistently with and subject to the mortgage. I am quite prepared to hold that any alienation by the mortgagor which infringes upon or is capable of doing injury to the rights of the prior mortgagee is not binding upon him, and he may sue to set it aside. But this, in my judgment, follows more from the rule of law than from any express covenant in the mortgage-deed. The rights of a mortgagee holding a mortgage with covenant or without covenant against alienation cannot be injured by any act of the mortgagor subsequent to the mortgage, and the mere existence of such covenant cannot entitle the mortgagee to claim rights other than those which are necessary (according to the nature of the mortgage) for the maintenance or enforcement of his security for repayment of the mortgage-debt, the sole object of the contract. I am therefore of opinion that transfers made in breach of covenants against alienation—covenants so often introduced in mortgage deeds and so often infringed by mortgagors in this country—are valid except in so far as they encroach upon the rights of the prior mortgagee, and that, with this reservation, such covenants do not bind the property so as to prevent the acquisition of a valid title by the alienee. I have considered it incumbent upon me to express my views on this point so fully, as there appears to have been a long conflict of decision on this subject as indicated by the many cases cited at pp. 124—127 of the 6th edition of Macpherson's book on Mortgages in India, and at the foot-note at p. 128 in the case of *Chunni* v. *Thakur Das* (1).

Applying this rule to the present case, it is clear that the hypothecation-deed obtained by Niamat on the 15th July, 1877, did not

(1) I. L. R., 1 All., 126.

and could not infringe upon the rights of the plaintiff as prior mortgagee under the deed of 17th July, 1875. Niamat took subject to prior liens which could not be defeated by the bond. Nor could the sale of the 20th November, 1880, which took place in enforcement of the lien in favour of Niamat, affect the plaintiff's prior liens. The covenant against alienation contained in the plaintiff's hypothecation-bond has therefore no prejudicial effect upon the rights of the defendants-appellants and the Judge was wrong in giving such effect to it against them.

I now come to the main issues of law in the case which appear to me to be :—

(i) Did the transaction which ended in the sale-deed of 2nd October, 1879, operate to extinguish the prior lien held by the plaintiff under the mortgages of 7th July, 1874, and 17th July, 1875?

(ii) If not, what are the respective rights of the parties in the property in suit?

On both these issues the recent Full Bench ruling of this Court in the case of *Gaya Prasad* v. *Salik Prasad* (1) is our guide. In that case, following the rule of equity explained in Story's Equity Jurisprudence, s. 1035 *c.*, and adopted by the High Court of Madras in *Ramu Naikan* v. *Subbaraya Mudali* (2), this Court held that "when it is the manifest intention of the mortgagee to keep alive the mortgage, or it is for his benefit to do so, it should be held that it subsists after the purchase." Following this rule, and applying it to the circumstances of this case, I am of opinion that the transaction of 2nd October, 1879, did not divest the plaintiff of his priority of lien under the mortgages of 7th July, 1874, and 17th July, 1875.

The second issue which remains to be considered involves the decision of the questions whether the rights acquired by the plaintiff under the sale-deed of 2nd October, 1879, operated to defeat the hypothecation-bond of 15th July, 1877, the decree of 29th September, 1879, and, as a corollary, whether the defendants-appellants acquired any rights under the auction-sale of the 20th November, 1880, and if so what the nature of those rights was?

(1) I. L. R., 3 All., 682. (2) 7 Mad. H. C. R., 229.

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It appears to me that for the purposes of this case, and so far as the defendants-appellants are concerned, the position of the plaintiff in respect to the property now in suit must be regarded as having a three-fold character.

1st.—As prior incumbrancer under the mortgages of 1874 and 1875.

2nd.—As puisne incumbrancer under the hypothecation-bond of 20th October, 1877, with reference to Niamat's bond of 15th July, 1877.

3rd.—As purchaser of the rights of Hubdar Singh such as those rights were at the time of the execution of the sale-deed of 2nd October, 1879.

These three capacities conferred upon the plaintiff distinct rights, and the case cannot be satisfactorily disposed of without adjudicating upon each of these rights with reference to the rights of the defendants-appellants.

The question of the extinguishment of prior lien by the sale-deed of 2nd October, 1879, having been disposed of in the plaintiff's favour, it is clear that his rights under the mortgages of 1874 and 1875 could not be affected by Niamat's subsequent mortgage of 15th July, 1877, the decree of 29th September, 1879, or the auction-sale of 20th November, 1880. And I therefore hold that the plaintiff's rights under the mortgages of 1874 and 1875 are still subsisting, and can be employed by him as the means of resisting the defendant-appellants' claim to the effect that they acquired under the auction-sale of the 20th November, 1880, rights free of the plaintiff's incumbrances.

As puisne incumbrancer under the deed of 20th October, 1877, the plaintiff was not bound by Niamat's decree of 29th September, 1879, to which he was no party. The auction-sale of 20th November, 1880, could not therefore *per se* bind him conclusively. It would no doubt have been more satisfactory if Niamat had recognized the fact that since his mortgage other rights in the property had come into existence by reason of the mortgage of 20th October, 1877, and that Hubdar Singh was no longer the sole person whose rights would be affected by enforcement of lien under the deed of 15th

July, 1877. But it was not absolutely incumbent upon Niamat, if he did not wish to obtain a final and conclusive adjudication entitling him to enforce his lien against the rights of the puisne incumbrancer also, to make the plaintiff a party to the suit which ended in the decree of 29th September, 1879. It was however advisable to have done so in order to have allowed the plaintiff the chance of disputing the validity of the deed on the ground of fraud or collusion, of contesting the amount claimed under the deed, and of raising other pleas which might have had the effect of wholly or partially relieving the property of liability to the lien of 15th July, 1877. Such a course would also have given the plaintiff as puisne incumbrancer the option of exercising his right to pay off Niamat's lien, with the object of obviating the sale of the property and thus saving his security of 20th October, 1877. All these rights however could have been exercised by the plaintiff equally effectively subsequent to the decree of 1879. But instead of adopting any of these courses, he hoped to defeat Niamat's decree by obtaining from the original mortgagor Hubdar Singh the sale-deed of 2nd October, 1879. In such cases, the rule recognized in these Provinces has been clearly explained by Turner, J., in the case of *Khub Chand* v. *Kalian Das* (1). After laying down the rule that it is not absolutely incumbent upon the holder of a mortgage to make incumbrancers parties to the suit for enforcement of the prior lien, the learned Judge went on to say :—"Of course such subsequent incumbrancers, if they are not made parties, might at any time before sale come in and redeem, and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated, unless they can show something more than the existence of their subsequent incumbrances, some fraud or collusion which entitled them to defeat the first incumbrance or to have it postponed to their own." In the present case no fraud or collusion on the part of Niamat having been established, his lien under the deed of 15th July, 1877, must be held to be valid. He acted rightly in bringing the property to sale in enforcement of his hypothecation charge. The plaintiff by his own action abandoned the right of paying off Niamat's lien and allowed the property to pass into the hands of strangers by process of law. In the

(1) I. L. R. 1 All., 248.

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absence of fraud or collusion he cannot be allowed to resile from the position in which he placed himself. The defendants-appellants must therefore be held to have purchased the rights of Hubdar Singh, such as they were at the date of the deed of 15th July, 1877, and at the time of the auction-sale, or in other words the equity of redemption subject only to the plaintiff's mortgages of 1874 and 1875. The rights of the plaintiff as puisne mortgagee under the deed of 20th October, 1877, must therefore be held to have been lost by the auction-sale of 20th November, 1880.

The decision on the remaining point in the case follows from what I have already said. The purchase by the plaintiff of Hubdar Singh's rights on the 2nd October, 1879, could not *per se* confer upon him any rights higher than Hubdar Singh himself possessed at the time. Those rights consisted of the equity of redemption subject to the plaintiff's own mortgages and also to Niamat's hypothecation of 15th July, 1877. The sale-deed in itself could not defeat the rights of incumbrances prior to the sale. And although part of the consideration of the sale consisted of moneys due on the prior mortgages, the sale cannot be regarded as enforcement of lien under those mortgages. It was a private transaction which gave Niamat no chance of exercising his undoubted right to save his security by paying off the prior charges, and thus placing himself in the position of first incumbrancer. The deed of sale was executed in his absence and without his acquiescence and could not therefore affect his rights. Nor could it place the plaintiff in a better or worse position so far as Niamat's lien was concerned Therefore what the plaintiff purchased were rights subject to the incidents which might legally flow from the hypothecation of 15th July, 1877; as indeed they did flow in the shape of the decree of 29th September, 1879, and the auction-sale of 20th November, 1880. What the plaintiff intended by the sale-deed was to defeat the consequence of those legal incidents. This, neither the rules of law, nor the principles of equity will allow. If such were not the rule a first mortgagee, holding a comparatively small charge upon property of large value,—sufficient to satisfy not only the first incumbrance, but also the puisne incumbrances,—could be enabled to defeat the right of all the puisne incumbrancers by simply obtaining a sale-deed of the equity of redemption from the

mortgagor, in the absence of puisne incumbrancers, without their consent, and without giving them even a chance of their rights by paying off the prior mortgage. Such a result would be opposed to all notions of justice, equity and good conscience and cannot be recognized by Courts of Justice. Therefore whilst on the one hand defendants-appellants are wrong in contending that the sale-deed extinguished the plaintiff's priority of rights under the mortgages of 1874 and 1875, the plaintiff on the other hand is equally wrong in claiming rights which would have the effect of defeating a valid charge, and of depriving the defendants-appellants of rights which they lawfully purchased at the auction-sale of 20th November, 1880. To sum up the reasons—the plaintiff as purchaser of the equity of redemption under the sale-deed cannot resist the defendant-appellants' rights, for that equity was subject to Niamat's lien of 15th July, 1877, in enforcement of which it was sold and purchased by the defendants-appellants—as incumbrancer holding liens prior to Niamat's lien, he (plaintiff) is entitled to insist upon his prior charges being paid off before the defendants-appellants could either oust him or be entitled to absolute proprietary right in the property.

Under this view, which in my judgment is consistent with the opinion of the Full Bench of this Court in *Gaya Prasad* v. *Salik Prasad* (1), I hold that all that plaintiff was entitled to in this litigation was a declaration that as holder of the prior mortgages of 7th July, 1874, and 17th July, 1875, respectively, he is entitled to continue in possession by virtue of his said liens; that the rights purchased by the defendants-appellants are subject to those liens and cannot be enforced as against the plaintiff, till full payment of the moneys due to him under the mortgage-deeds above mentioned.

The result of this judgment would be that the appeal would be partially decreed, the decree of the lower appellate Court, so far as it declares the plaintiff-respondent entitled to absolute proprietary right in one anna share, and so far as it cancels the hypothecation-deed of 15th July, 1877, the decree of 29th September 1879, the miscellaneous order of 25th September, 1880, and the sale of 20th November, 1880, would be set aside, and the rest of it confirmed, and the plaintiff-respondent's objections under s. 561,

(1) I. L. R., 3 All. 684.

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Civil Procedure Code, would be disallowed. As to costs, I would under the circumstances direct that the parties bear their own costs in all Courts.

TYRRELL, J.—I concur in the order proposed by my hon'ble colleague.

Decree modified.

1882 *June* 19.

CIVIL JURISDICTION.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BEAKE AND CO. (PLAINTIFFS) *v.* DAVIS (DEFENDANT)*

Act XV of 1877 (*Limitation Act*), *ss.* 9, 13—*Continuous running of time—Exclusion of time of defendant's absence from British India.*

S. 13 of the Limitation Act, 1877, is not in any way affected or qualified by s. 9 of the same Act.

In computing, therefore, the period of limitation prescribed for a suit, the time during which the defendant has been absent from British India should be excluded, notwithstanding that such period had begun to run before the defendant left British India.

Narronji Bhimji v. *Mugnirum Chandaji* (1) dissented from.

THIS was a reference by Mr. R. D. Alexander, Judge of the Court of Small Causes at Allahabad. The following statement of the case was made by the Judge:—

"This is a suit to recover payment for goods sold and delivered on the following dates—(i) 9th November, 1878; (ii) 13th March, 1879; (iii) 14th April, 1879; (iv) 13th January, 1880. The suit was brought on the 25th May, 1882, and under ordinary circumstances, as far as the goods supplied on dates (i), (ii) and (iii), are concerned would be barred by limitation. The plaintiff claims exemption from limitation on the ground that during the greater part of 1880-81 the defendant was absent from British India. This may be taken as proved. The plaintiff relies on s. 13, Act XV of 1877. There has, however, been a recent ruling by the Bombay High Court [*Narronji Bhimji* v. *Mugnirum Chandaji* (1)] in which it has been held that ss. 9 and 13, Act XV of 1877, must be read together, and that once a cause of action has arisen, the subsequent

* Reference No. 153 of 1882.

(1) I. L. R., 6 Bom. 103.

absence of a defendant from British India cannot be excluded in computing limitation. In the present case the cause of action had arisen also before the defendant left British India; and the question I wish to refer to the Hon'ble Court is—"Whether under the circumstances as stated the plaintiff's claim for sums due on dates (i), (ii) and (iii) is barred by limitation or not?"

"With due respect for the decision of the learned Judge in *Narronji Bhimji* v. *Mugnirum Chandaji* (1), I wish to point out that the language used in ss. 9 and 13 makes it appear very doubtful to me if it was ever intended that s. 9 should control s. 13, any more than that it should control s. 14, which of course would be a "*reductio ad absurdum.*" S. 9 says: "When once time has begun to run, no subsequent disability or inability to sue stops it." The section therefore contemplates (i) a disability such as described in s. 7; and (ii) an inability such as want of funds and the like. S. 13 says: "In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded." There is no reference made to disability or inability here, but a simple, plain and imperative direction of law, equally simple, plain and imperative as the direction in s. 14 that a certain time in a certain class of suits shall be deducted.

"There was no inability to sue. The law (s. 89, Civil Procedure Court) contemplates a suit being brought against a defendant out of British India, by providing a method for service of summons on him. It cannot be said therefore that the plaintiff was unable to sue. But s. 9 only provides for cases where there is a subsequent disability or inability to sue. I venture therefore to state my opinion that s. 13 is in no way connected with s. 9. Its very place in the Act, *viz.*, in Part III, "Computation of Limitation," appears to me to show that to be the case, and that it is one of a series of sections which provide imperatively for the exclusion of time on the occurrence of certain specified events. Looking at the position of s. 13, I am of opinion that it should be read by itself; and I would lay special stress on the fact that absence from British India on the part of the defendant does not constitute in any sense an inability

(1) I. L. R., 6 Bom. 103.

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to sue on the part of the plaintiff. I would therefore allow the plaintiff's claim, but as in doing so I should be running counter to one of the High Courts reported in the Indian Law Reports, and as I can find no decided case on the point, I refer the question to the High Court for its decision. The decision is of some importance, as I have other cases pending in which the same point arises, and may expect similar suits in future."

The parties did not appear.

The Court (STRAIGHT, J. and MAHMOOD, J.) delivered the following opinion :—

STRAIGHT, J.—It appears to us that s. 13 of the Limitation Act is in no way affected or qualified by s. 9 of the same Law, and that its obvious scope and intention is to save the creditors, subsequently suing their debtors, the period during which such debtors have been absent from British India. The omission of the words "unless service of summons to appear and answer in the suit can during such absence be made under the Code of Civil Procedure, s. 60," which figured in s. 14 of the Act of 1871, from the present Law gives the most general effect to s. 13 of Act XV of 1877, and obviates any arguments, that might have been deduced from their presence, had they been found in the present Act. The Bombay case referred to—*Narronji Bhimji* v. *Mugnirum Chandaji* (1)—was a decision on the original side, and we find ourselves unable to concur in it. We make no order as to costs.

APPELLATE CIVIL.

1882 *June* 24.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

INDAR KUAR (DEFENDANT) *v.* LALTA PRASAD SINGH (PLAINTIFF.)*

Hindu Law—Mitakshara—Hindu widow—Alienation—"Legal Necessity"—Litigation—Reversioner

R, a Hindu widow, who had succeeded to the estate of her deceased husband, mortgaged a portion of it to *L*, as security for the repayment of money which she borrowed from him for the purpose of suing for an estate to which her deceased husband had an alleged right of succession, which he had not however himself sought to enforce. This suit was dismissed. *R* subsequently transferred her

* First Appeal, No. 125 of 1880, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 9th September, 1880.

(1) I. L. R., 6 Bom. 103.

deceased husband's estate to his daughter *I. L* sued *R* and *I* to enforce the mortgage made to him by *R*, by cancelment of such transfer.

Held that the mere fact that the mortgaged property had been transferred to *I* did not preclude her from contending, as next reversioner, that the mortgage of such property by *R* was void for want of "legal necessity"

That, under the circumstances stated above, there was not any "legal necessity," within the meaning of the Hindu Law, for such mortgage, and such suit not having been for the benefit of the estate of *R's* deceased husband, that consequently such mortgage was not valid so far as the reversionary right of *I* was concerned.

That, however, *I's* right to the mortgaged property as transferee from *R* was subject to such mortgage.

The nature of a Hindu widow's estate in her deceased husband's immoveable property, her power of alienation generally, and her power of alienation in particular for the purposes of litigation, discussed.

Hunoomanpersaud Panday v. *Babooee Munraj Koonweree* (1); *The Collector of Masulipatam* v. *C. V. Narrainapah* (2); *Grose* v. *Amirtamayi Dasi* (3); *Phool Koer* v. *Dabee Pershad* (4); *Roy Mukhun Lall* v. *Stewart* (5); *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (6); and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (7) referred to.

THE facts of this case are fully stated in the judgment of the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The following judgment was delivered by the Court (BRODHURST, J. and MAHMOOD, J.):

MAHMOOD, J. (BRODHURST, J., concurring).—The following table shows the relative position of some of the persons to whom reference is necessary in stating the facts of the case:—

Mata Dayal Singh.
|
Partap Narain Singh.
|
Rajjan Kuar, widow. | Sarsar Kuar, daughter. | Indar Kuar, daughter.

Partap Narain Singh died about the year 1874 without any male issue. Rajjan Kuar succeeded to his estate as a sonless Hindu widow. It is said the Partap Narain had been adopted by

(1) 6 Moo. I. A., 393.
(2) 8 Moo. I. A., 529.
(3) 4 B. L. R., O. C., 1; 12 W. R., O. C., 13.
(4) 12 W. R. 187.
(5) 18 W R. 121.
(6) 11 Moo. I. A., 241.
(7) L. R., 2 Ind. Ap. 275.

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the Rani of Tikari, a large zamindari estate in the Province of Behar, and that he was therefore entitled to succeed to the Tikari Raj; but it does not appear that Partap Narain Singh ever took any steps to obtain possession of the Raj on the ground of this alleged adoption. The adoptive Rani of Tikari is said to have died soon after the death of Partap Narain Singh. Rajjan Kuar his widow appears to have been advised to bring a regular suit in the Civil Court of Gaya for recovery of possession of the Tikari Raj on the ground of her late husband's adoption by the deceased Rani. The suit would no doubt involve large expenses in connection with the litigation, and we find that on the 22nd July, 1876, Rajjan Kuar executed a hypothecation-bond for Rs. 8,000 in favour of one Haripanth Rao, pledging as security for the loan the property now in suit. It may here be stated that Haripanth Rao was admittedly only the ostensible mortgagee, and that the real obligee of the deed was the present respondent Lalta Prasad Singh, in whose favour Haripanth Rao executed an *ikrar-nama* to the above effect on the 6th September, 1876. There is therefore no question that the plaintiff is entitled to sue on the hypothecation-bond.

The bond, after reciting how Rajjan Kuar had succeeded to the property of her deceased husband, goes on to say:—"Now being under the necessity of borrowing money to meet the expenses of a regular suit regarding the Tikari Raj which has been instituted in my behalf in the Civil Court at Gaya, I have borrowed Rs. 8,000, on interest at 14 annas per cent. per mensem, from Haripanth Rao.....to be repaid in three years, and have brought the same to my own use."

Rajjan Kuar's suit for the Tikari Raj was dismissed by the Civil Court of Gaya, and the decree was formally upheld by the High Court at Calcutta on the 27th March, 1879.

On the 15th October, 1879, Rajjan Kuar executed a document called a "deed of relinquishment" in favour of her two daughters, Sarsar Kuar and Indar Kuar, in respect of the estate left by Partap Narain Singh. The deed, after reciting that a great portion of the moveable and immoveable property had been wasted and lost, goes on to say:—"I fear that all the property now remaining will also be lost and ruined in consequence of my mismanagement, and in case

the remaining property detailed below is lost and ruined, I shall be blamed, and the daughters will have ground of complaint against me: that now my daughters have attained their majority, and have become discreet, and both of them in consequence of the waste of their paternal estate are about to institute a suit for obtaining possession over the remaining properties, and they have also a mind to institute a suit for damages on account of the wasted property, and I, without any pressure, compulsion, fraud or inducement on the part of my daughters, am willing to relinquish my possession of the remaining property; that therefore with a view to avoid shame and future dispute, and to secure my peace in the other world, I have withdrawn my possession from the said properties ..... and having given them to the said daughters, who had inherited them in their own proprietary right as heirs to my husband, I have of my own free will and accord put them in possession of the same." The deed further provided that Rs. 16 per mensem were to be paid to the executant by her two daughters during her lifetime.

Subsequent to the deed, Sarsar Kuar appears to have died without leaving any issue; and it is admitted that Indar Kuar obtained possession of the property under the deed, and that her name now stands in the Government revenue records as proprietor in the place of the name of Rajjan Kuar.

The suit from which the appeal has arisen was commenced on the 27th April, 1880, by Lalta Prasad Singh against Rajjan Kuar and Indar Kuar. The object of the suit was recovery of Rs. 12,483-5-4 by enforcement of lien under the hypothecation-bond of 22nd July, 1876, by setting aside the deed of the 15th October, 1879, on the ground that it was collusively executed to injure the plaintiff's rights under the bond.

Various pleas were urged by the defendants in the Court below, and some of them have been repeated in the grounds of appeal before us. But the learned pleader for the appellant does not press all the pleas except those which will be presently noticed.

The Subordinate Judge declined to go into the question whether the deed of relinquishment had been fraudulently and collusively executed, because he held that the deed could not in any case have

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the effect of defeating the plaintiff's charge previously created under the hypothecation-bond on which the suit was based. He further held that the necessity for which the money was borrowed was a legal necessity, which justified Rajjan Kuar in mortgaging the property for meeting the expenses of the law-suit. His reasons for this finding are thus expressed in his own words :—" She in good faith believed her husband, Partap Narain Singh, to have been the adopted son of the Rani of Tikari, and therefore to have been the owner of the Raj of Tikari. It was to preserve this estate of her husband that the defendant Rajjan Kuar resorted to litigation. Her endeavour to preserve by litigation what she honestly believed to have been her deceased husband's estate, and therefore hers by inheritance, was therefore quite justifiable. And to meet the expenses of the litigation, she incurred the debt in suit, and mortgaged the said property as security for the loan, and the mortgage was a legal one, and the property in suit is liable to the debt." On the evidence before him the Subordinate Judge held that the pecuniary circumstances of Rajjan Kuar were not sufficiently affluent so as to place her above the necessity of borrowing the loan. He accordingly decreed the whole claim with costs and interest at 6 per cent per annum by enforcement of lien against the hypothecated property. From this decree the present appeal has been preferred only by Indar Kuar.

The learned pleader for the appellant having given up the 1st, 4th, and 5th grounds of appeal, the contention before us raises only three questions for determination—1. Were the pecuniary circumstances of Rajjan Kuar at the time of the hypothecation of the 22nd July, 1876, such as to place her above the necessity of borrowing money for the purpose of the litigation relating to the Tikari Raj?—2. Was the money borrowed under the hypothecation-bond raised for the purpose of the litigation and expended in defraying the expenses thereof?—3. If so, did the litigation constitute such a necessity under the Hindu Law as would justify alienation of the property by a Hindu widow in the position of Rajjan Kuar?

There is no question that the present case is governed by the Mitakshara law. Before entering into the consideration of the merits of the case, it is necessary to explain that the deed of relinquishment executed by Rajjan Kuar on the 15th October, 1879,

was *per se* lawful and valid under the Hindu Law. The position of the daughters, so far as the facts appear in this case, was that of next heirs after the termination of Rajjan Kuar's estate in the property of her deceased husband, and she was at liberty to cede her rights to her daughters. The effect of such relinquishment was only to accelerate their succession to the property and to entitle them to immediate possession. But whilst the learned pleader for the respondent concedes this point, he contends that the very circumstance that Indar Kuar obtained possession of the property under a gift from her mother places her in the position of representing the latter, and precludes her from questioning the legality of the mortgage of the 22nd July, 1876. But this contention in my judgment is only partially correct. It is true that any transfer of her rights by Rajjan Kuar subsequent to the plaintiff's mortgage cannot place those who take under that transfer in a better position in respect to the property than Rajjan herself was when she executed the deed of relinquishment. But in the present case the rights of Indar Kuar are not limited to those derived by her under that deed. She is admittedly entitled to inherit from her father under the Hindu Law. As next heir entitled to possession upon the termination of her widowed mother's estate, she has the right to question the legality of any transfer made by the widow. And this right cannot be defeated simply by the fact of her taking the benefit of the deed of relinquishment. I am therefore of opinion that Indar Kuar is entitled now, as she undoubtedly was before the execution of the deed of relinquishment, to contend that the hypothecation of the 22nd July, 1876, was illegal and invalid under the Hindu Law for want of legal necessity. Under this view she occupies two distinct capacities in the present case, *first* as next heir to the property irrespective of the deed of relinquishment, and *secondly* as the person in possession of the property by virtue of that deed. In her former capacity she is entitled to raise the pleas which she has urged against the validity of the mortgage, and in the latter capacity her rights, so for as they are derived from the deed of relinquishment, are bound by the prior acts of Rajjan Kuar. The case being thus presented in its two different aspects it will be convenient to consider each part of it separately.

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Entering upon the merits of the case with reference to the three main points in issue, I am of opinion that there is no clear and specific evidence, on either side, to prove the exact pecuniary circumstances in which Rajjan Kuar was left by her deceased husband. It however appears by the oral evidence of Ganeshi Lal and Mathura Prasad that the estate yielded about Rs. 12,000 per annum net profits, an income which in itself appears to be more than adequate to maintain a Hindu widow and her two minor daughters. There is also some documentary evidence suggesting the conclusion that besides immoveable property Partap Narain Singh had left cash and money claims, but this point is not satisfactorily established by the best evidence. On the other hand it appears that subsequent to the death of Partap Narain Singh Rajjan Kuar was involved in litigation with her father-in-law Mata Dayal Singh, and her husband's cousin, Bechu Narain Singh. She also had to bring a suit against one Bhaggu Lal, said to have been a gomashta of her deceased husband, and it is also stated that she had to undertake some other litigation in the district of Gaya besides the suit for the Tikari Raj Moreover she had to incur the expenses of marrying her two daughters. It is however not shown that the litigation above mentioned involved large expenditure of money, and the expenses of the marriage ceremonies have been estimated by the witness Mathura Prasad to have been about Rs. 8,000. The only large item of expenditure incurred by Rajjan Kuar appears to have been the cost of the litigation in regard to the Tikari Raj. From the decree of the Calcutta High Court, dated the 27th March, 1879, it appears that the case was valued at Rs. 21,66,098-0-0, and I can quite believe the statement of Mathura Prasad and Ganeshi Lal who estimate the expenditure on the litigation at Rs. 25,000 approximately. A large item of expenditure like this would not be within the pecuniary means of Rajjan Kuar, and it is not likely that she would have ready money to meet the expenses of the litigation. Though the accounts produced by Ganeshi Lal, formerly in the service of Rajjan Kuar as her treasurer, apparently go to show, by the report of the Commissioner who examined the accounts, that Rs. 14,118-0-0 were expended out of the profits yielded by the estate on the Tikari suit, I cannot hold that Rajjan Kuar was above the necessity of borrowing Rs. 8,000. The recital

in the plaintiff's hypothecation-bond of the 22nd July, 1876, as to the object of the loan appears to be true.

In regard to the second point at issue in appeal, much need not be said. It is true that there is no specific evidence to prove that the identical sum of Rs. 8,000 borrowed from the plaintiff was expended on the litigation connected with the Tikari Raj. But I am of opinion that no such proof was necessary. The Lords of the Privy Council in the celebrated case of *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (1) have laid down the rule that the lender, though he should not advance money without reasonable inquiries as to the existence and nature of the necessity, is not bound to see to the application of the money. "The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application (2)." The case in which the rule was laid down referred to alienations made by the manager for an infant heir, but the rule has since been followed by the High Courts in India as substantially applicable to transactions whereby money is advanced to Hindu widows as a charge upon the estate. In the present case there are however some indications, arising from the circumstances, which point to the conclusion that the money advanced by the plaintiff was actually spent on the Tikari suit. Rajjan Kuar's own account books, reported upon by the Commissioner appointed to examine them, go to show that out of the income of her estate only Rs. 14,118-0-0 were expended on the Tikari suit.

The total cost of the litigation has been stated to have been Rs. 25,000 approximately, and it is not shown how the balance of this sum was found otherwise than by the loan borrowed from the plaintiff.

It seems to me that by far the most important point in the case is the question involved in the third issue in appeal, *viz.*, whether the litigation in regard to the Tikari Raj constituted such a necessity as would entitle Rajjan Kuar to alienate her husband's property by hypothecation. If the answer to this question is in the affirmative, there can be no doubt that the plaintiff is entitled

(1) 6 Moo. I. A. 393. (2) at. p. 424.

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to enforce his lien against the property, and the decree of the Subordinate Judge must be fully confirmed. On the other hand, if the answer is in the negative, the decree of the lower Court cannot be maintained *in statu quo.*

In order to determine this question it seems to me necessary to bear in mind the exact nature of a Hindu widow's estate in the property of her deceased husband. That estate has often been described by analagous terms of the English Law, which, as the Lords of the Privy Council have pointed out in the case of *The Collector of Masulipatam* v. *C. V. Narrainapah* (1), are liable to mislead. The estate cannot be called a "life-estate", because the holder of such an estate cannot in any case convey an absolute title. The widow on the other hand is entitled under the Hindu Law to convey property absolutely out and out, provided certain conditions justify such conveyance. She cannot be described as a manager or trustee for the benefit of the reversionary heirs, for she is not in any sense accountable to them as a manager or trustee. During her life she possesses a vested interest in the property to the exclusion of all others; her right of possession and enjoyment is complete, and her position as such cannot be disturbed by the reversioners. In some incidents no doubt a widow's estate may be compared to a life-estate or to property held in trust. But the comparison falls far short of being complete, and her estate must necessarily be considered as incapable of complete and exact denotation by any single expression known to the phraseology of the English Law. It can best be defined in the words of the Privy Council in the case already cited :— "Under the Hindu Law the widow, though she takes as heir, takes a special and qualified estate. It is a qualified proprietorship, and it is only by the principles of the Hindu Law that the extent and nature of the qualification can be determined." That qualification imposes certain restrictions upon her estate—restrictions which belong to the very nature and essence of the estate, wholly irrespective of the existence or non-existence of the reversionary heirs. They can no doubt claim the benefit of those restrictions, but the mere non-existence of such heirs cannot confer upon the widow an estate of a

(1) 8 Moo. I. A. 529.

less qualified nature than she would otherwise have had. For in the absence of such heirs the Sovereign can claim the property by escheat and contest the validity of alienations made by the widow.

Such I understand to be the effect of the ruling of the Privy Council in the case to which reference has already been made. In that same case the Lords of the Privy Council have laid down the principle which lies at the root of the limitation imposed upon the widow's estate :—"If there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity." Now this rule, whilst fully recognizing the general principle that a Hindu widow, as a *general rule*, has no power of alienation, and that the *exception* lies in case of legal necessity, draws a clear distinction between *spiritual purposes* and *worldly purposes*. It also points out that the power of the widow to alienate property for worldly purposes is much more limited than in the case of the former class. I doubt whether the original texts of the Hindu Law recognize the validity of alienations by the widow for any purposes other than those which are conducive to the spiritual benefits of her deceased husband. The principle on which the rule of Hindu Law seems to turn is that anything done by the widow to benefit him to whom the property is still supposed to belong is lawful. I am not aware of any original authority of Hindu Law which goes beyond this. That the widow may, in certain cases of urgent necessity connected with the protection of the estate, alienate a portion of the property, is no doubt a principle well recognized by Courts of Justice in India, and has received the approval of the Lords of the Privy Council. But this extension of the original doctrine seems to have arisen from the exigencies of modern life rather than the precepts of Hindu Law, and to have originated in the principles of equity, which could not be disregarded in administering an ancient law, and in adapting its behests to the present conditions of life in British India. I have considered it necessary to point out this distinction, because the expression "legal necessity"

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does not appear to be a term of Hindu Law, and has not, so far as I am aware, been exhaustively defined by any authentic decision. It is only by instances that an idea of what amounts to legal necessity can be gathered from the Hindu Law, and the numerous decisions to be found in the reports. In the present case we are not concerned with legal necessity arising from spiritual purposes; for it is not contended that a law-suit amounts to a spiritual purpose.

The question, whether litigation can be regarded as a legal necessity under the Hindu Law, is one which seems to be involved in considerable difficulty, the more so as it does not appear to have been the subject of more than a few rulings, none of which, so far as I am aware, belong to this Court. It may be taken that any litigation, which has for its object the protection of the property from wrongful invasion, may give rise to legal necessity. The same may be said to be the rule, where the object of the loan is the payment of arrears of Government revenue or the liquidation of a decree passed against the widow as representing the husband. It may also be conceded that a Hindu widow, when wrongfully deprived of her husband's property, may raise necessary funds on the security of that property for the purpose of recovering possession. Such seems to me to be the effect of the ruling of the Calcutta High Court in the case of *Grose* v. *Amirtamayi Dasi* (1). But the facts of that case were vastly different to the present. The widow in that case had been kept out of possession of her entire estate, and far from having the means of instituting a suit, she was even destitute of maintenance. I therefore do not consider that ruling as applicable to the present case. On the other hand, the same Court in the case of *Phool Koer* v. *Dabee Pershad* (2) would not allow the widow to give her husband's property as security for costs, &c., of an appeal to the Privy Council. It was argued in that case that the widow's (appellant) action in offering the security was one of legal necessity, such as would bind the estate against all reversioners. But the Court, regarding the argument as altogether untenable, held that the necessity was not such as was contemplated by the Hindu Law, the appellant (widow) being under no necessity and under no moral obligation to take

(1) 4 B. L. R., O. C., 1; 12 W. R., O. C., 13. (2) 12 W. R 187.

her husband's case before the Privy Council. In one sense the ruling is a very strong one, because in that case the security-bond had been originally filed by the widow's husband himself, who had however died before the security had been accepted. But a stronger ruling even than this is to be found in the case of *Roy Mukhun Lall* v. *Stewart* (1), in which the question arose in regard to a bond executed by the widow for raising funds to prosecute a suit for the benefit of the estate. Couch, C. J., in delivering the judgment of the Court, observed that it was not a necessity at all, "because there was no necessity to institute the suits, though it may have been a proper thing for her to do as being beneficial to her as well as to those who would succeed her in the property."

In my opinion a distinction should be worn between litigation undertaken to *protect* the property, and litigation the object of which is to obtain a possible *benefit* for the estate. The former relates to the security of that which has already been acquired and is in actual possession; the latter relates to that which may possibly be acquired. As a general rule, the former class of litigation would no doubt amount to legal necessity; and in regard to the latter class of litigation it may be laid down that, if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner, on the analogy of the maxim—he who enjoys the benefit ought to bear the burden also. It may be further laid down that in cases where the litigation undertaken by the widow is not undertaken for the benefit of the estate, any alienations made by her for the purpose of prosecuting the litigation are necessarily invalid and do not bind the property. It may often be a question of nicety to determine the exact nature of a litigation when it actually ends in failure. The widow may have been acting with a view to benefit the estate; the creditor may have advanced money to her without any fraudulent intention. But these circumstances alone do not in my judgment warrant the conclusion that the charge created by the widow should bind the property as against the reversioners. The position of a Hindu widow is one of a very qualified ownership; she is positively prohibited from alienat-

(1) 18 W. R. 121.

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ing the *corpus* of the property except for the benefit of the soul of her deceased husband; her only interest in the property consists of possession and enjoyment during her life; and it follows that she may do all that is absolutely necessary to save the property to which she has succeeded. According to my view of her position it does not lie within her province to enter upon speculative litigation however much the motive may be to benefit the estate. She cannot take upon herself the responsibilities of a full proprietor, and the spirit of the Hindu Law prohibits her from endangering the property, which is only temporarily in her possession and must necessarily pass to others upon her death. The life enjoined upon the widow by the Hindu Law is strictly one of an ascetic description; and though Courts of Justice, regarding it as merely a moral and religious obligation, will not enforce upon her any such austerities, they must in the interests of reversioners impose such restrictions upon her dealing with the property as will save it from waste. If such were not the rule, an imprudent widow, convinced of what might possibly prove beneficial to the estate, might embark upon litigation or enter into transactions, which, far from benefiting, may end in disaster and ruin to the estate. In my judgment the Hindu Law does not contemplate the position of the widow to be of such a nature, and however liberally we may interpret the law in her favour, it falls short of investing her with discretion such as might jeopardize the estate.

The circumstances of the present case show that the action of Rajjan Kuar in undertaking the expensive litigation in regard to the Tikari Raj was highly imprudent. Partap Narain Singh was supposed to have been lawfully adopted by the Rani of Tikari, and if it were so he might possibly have had the right to succeed to the Raj. But he never attempted to rely upon his adoption, and never sued for possession of the Raj. It is not necessary to enter into the merits of the suit which Rajjan instituted. What we know is, that she took upon herself to acquire by litigation what her husband had never attempted to sue for, and we also know that both the Courts before whom the litigation went entirely dismissed her claim. Under such circumstances it cannot be held that any *necessity*, such as is contemplated by the Hindu Law, existed for the loan which she borrowed from the plaintiff. Nor can it be said that the litigation was for the benefit of the estate, for events have shown that

quite the contrary has been the result. I am therefore of opinion that the charge created by the bond of the 22nd July, 1876, cannot bind the estate, and cannot prejudice the rights of Indar Kuar in her capacity as next heir. The plaintiff has not shown that in taking the hypothecation-bond he made any reasonable inquiries as to the nature of the purposes for which the money was required. The bond itself recited what the nature of Rajjan Kuar's interest in the property was, and the object for which the money was borrowed. He must therefore be taken to have advanced the money under the risks which attend such transactions, and having shown no due diligence in investigating the nature of the alleged necessity, he cannot now complain if the security has proved to be of less value than he supposed it to be.

But in her capacity as donee under the deed of relinquishment of the 15th October, 1879, Indar Kuar cannot be held to have acquired any rights higher than those which Rajjan Kuar herself possessed. Those rights were subject to the hypothecation lien held by the plaintiff, and it is clear that the possession which Indar Kuar now holds has been due entirely to the deed of relinquishment. Therefore so long as Rajjan Kuar is alive Indar Kuar's right of possession and enjoyment of the property must be held to be subject to the charges created by her before the deed of relinquishment. It has been held by the Lords of the Privy Council that the rights and interests of a Hindu widow are liable to be sold in execution of decree against her—*Nugènderchunder Ghose* v. *Sreemutty Kaminee Dossee* (1)—and that when such sale takes place the purchaser only acquires the widow's estate which subsists during the continuance of her life—*Baijun Doobey* v. *Brij Bhookun Lall Awusti* (2)—and then the property reverts to the next heir who can oust the purchaser.

For these reasons, I would partially decree the appeal, and direct that the decree of the lower Court so far as it directs the absolute sale of the property in suit, and so far as it orders Indar Kuar, defendant-appellant, to pay the costs of the plaintiff-respondent, be set aside; that the decree of the lower Court be so modified as to order the rights and interests of Rajjan Kuar, defendant, such

(1) 11 Moo. I. A. 241. (2) L. R. 2 Ind. Ap 275.

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as they were at the date of the hypothecation-bond of the 22nd July 1876, to be sold in enforcement of the lien in execution of the decree; and that the rest of the lower Court's decree be confirmed; and under the circumstances of the case I would make no order as to the costs of this appeal.

Decree modified accordingly.

1882 *June 28.*

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

SALIG RAM (PLAINTIFF) v. JHUNNA KUAR (DEFENDANT).*

Agreement to refer to arbitration—Award—Suit in respect of matter referred barred—Act I of 1877 (Specific Relief Act), s. 21.

The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held* that, under these circumstances, the further hearing of such suit was barred.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Mr. *Howell*, Babu *Jogindro Nath Chaudhri*, and Munshi *Kashi Prasad*, for the respondent.

The judgment of the Court (STUART, C. J., and TYRRELL, J.) was delivered by

TYRRELL, J.—In this case a preliminary objection is taken by Mr. Howell for the respondent that there is no appeal to this Court, the arbitration having been private and not by order of the Court. This objection we disallowed, seeing that no award had been filed and that therefore s. 522 did not apply. This matter is further alluded to in the following judgment.

This was a suit brought in the Court of the Subordinate Judge of Agra by one Salig Ram against two persons named Jhunna Kuar and Chain Sukh in respect of some sums of money aggregating Rs. 5,175-7-0. The suit was instituted on the 17th November, 1880. The first hearing was fixed for the 4th January,

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* First Appeal, No. 124 of 1881, from a decree of Maulvi Sultan Hasan Khan, Subordinate Judge of Agra, dated the 12th July, 1881.

1881. On this date both parties appeared in the Court of the Subordinate Judge and asked for adjournment of the suit to any date beyond 15 days from the 4th January, 1881, alleging that they had come to an agreement that all the matters in dispute between them, including the present suit, should, within the said period of fifteen days be settled and determined by private arbitration. The Subordinate Judge assented to this prayer, and adjourned the suit to the 21st January, 1881.

On the 22nd January, 1881, the parties appeared again in Court and filed pleadings, the defendants asserting that the arbitration had taken place on the 7th January, and that its result embodied in writing had been registered in the registration department on the 18th idem, and the plaintiff on the other hand objecting (*a*) that the arbitrators were partial to the other side; (*b*) that prior to their arbitration award he had served them with oral and written notices that he revoked his consent to arbitration; and (*c*) that the arbitration having been made without the intervention of the Court could have no effect on the pending suit. The Subordinate Judge framed an issue on these allegations and found on evidence that the plaintiff had made a valid agreement to refer this suit, among other matters, to the arbitrament of certain persons, and to abide by their decision therein; that the arbitrators made their award on the 9th January, 1881, and caused its registration on the 18th; that prior to the 9th January, 1881, the plaintiff had not, orally or in writing, notified to the arbitrators his revocation of reference to their arbitrament, and that the only notice he gave on the subject was not sent till the 17th January, or eight days after the arbitrators had made their award dismissing his claim as brought in this suit. The Subordinate Judge therefore rightly held, though in rather obscure and somewhat inadequate terms, that the plaintiff was barred from proceeding with this suit. This finding and decree are impugned here on six pleas, which resolve themselves into three only; which are that the arbitration award was bad by reason of corruption; that it could not therefore be noticed by the Court below; and that it was a nullity, inasmuch as the plaintiff had, before the award was made, formally withdrawn from his contract to refer. This last plea is negatived by unanswerable facts and dates disclosed by the

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record, and was not pressed before us. The other pleas are without weight independently of the fact that by the plaintiff's own showing, (see his written statement filed in Court on the 22nd January, 1881), the improper gratification said to have been given to one of the arbitrators is alleged by him to have been given on the 14th January, 1881, or subsequently to the arbitration proceedings. The Court below did not, as indeed it could not, treat the proceedings in arbitration as if they had been had and made under the Civil Procedure Code, and consequently pleas founded on the provisions of the 37th Chapter of that Code were and are irrelevant to the decree before us. It is undeniable, and it is admitted by the appellant, that on the 17th December, 1880, he executed a formal agreement in writing between himself on the one part and Jiwa Ram, Chain Sukh, Sri Gopal, and Jhunna Kuar on the other to refer to arbitrators named in the deed the matters in dispute in this suit, the said arbitrators being thereby appointed and empowered to decide these matters, and the parties solemnly binding themselves that "we agree and contract that in respect of the said dispute whatsoever the said arbitrators decide, divide, adjudge, award, settle and determine with regard to any and every point in issue, this decision shall be accepted by us, and we shall make no objection thereto." This agreement was registered according to law on the 20th December, 1880: and remained binding on, and unrevoked by, the parties, or any of them, till after the award made thereunder had been made and recorded.

By part of that award the claim brought in this action by the appellant against Jhunna Kuar, respondent, was found to be bad, and was dismissed: and under the rule of law embodied in the final provision attached to s. 21 of the Specific Relief Act (I of 1877), it is not competent to the plaintiff, who had made a contract to refer a controversy to arbitration, which contract was carried into effect, to maintain a suit in respect of any subject which he has contracted to refer. The further hearing therefore of the present suit, under the circumstances explained above, was rightly held to have been barred: and the decree of the lower Court must be affirmed. We dismiss this appeal with costs.

Appeal dismissed.

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ACCOUNTS STATED. *See* Contract, substitution of new 330

ACTS——1856——XV., s. 3 —— *Re-marriage of Hindu widow—Guardianship of children of deceased husband.*] On the re-marriage of a Hindu widow, if neither she or any other person has been expressly constituted by the will or the testamentary disposition of the deceased husband the guardian of the child, and such child has property of his own sufficient for his support and education whilst a minor, such child should ordinarily be regarded as a child "who has neither father or mother" in the sense of s. 3 of Act XV of 1856, and in such a case a proper male relative of the deceased husband should ordinarily be appointed guardian of such child in preference to his re-married mother.

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——1858——XXXV, s. 23. *See* High Court's Charter, s. 12 159

——XL, s. 3—*Suit on behalf of minor—Permission to relative to sue.*] The mother of a minor, who had not obtained a certificate under Act XL of 1858, instituted a suit on behalf of the minor for some property of small value She did not ask the Court in which she instituted the suit for permission to institute it, as required by s. 3 of that Act, but the Court entertained it, the defendant not raising the objection that it had been instituted without permission, and it was decided on the merits in favour of the minor. *Held* that, under these circumstances, it must be taken, notwithstanding there was no order allowing the mother to sue, that the suit was instituted with the Court's permission.

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—— *Suit against minor—Permission to relative to defend.*] The mother of a minor, who did not hold a certificate under Act XL of 1858, was sued on behalf of the minor. She did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor. *Held* that, under these circumstances, it must be inferred that the Court had given her permission to defend the suit, as required by s. 3 of Act XL of 1858, and therefore the decree made against her in the suit as representing the minor was binding on the latter.

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——1859——VIII, ss. 226, 229, 231—*Obstruction to execution of decree for land—Fresh suit.*] The holder of a decree for land, having been resisted in obtaining possession thereof by a person other than the defendant, claiming to be in possession of such land on his own account, complained under Act VIII of 1859 of such resistance to the Court executing the decree. The Court rejected such application on the ground that it had been made after the time limited by law. *Held* that the order rejecting such application could not be regarded as one under s. 229 of Act VIII of 1859, which would under s. 231 preclude such decree-holder from instituting a suit against such person for such land.

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ACTS——1860——XXVII, s 2,—*Debt due to estate of deceased person—Suit by legal representative—Certificate for collection of debts.*] It is not an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate that such legal representative should first obtain a certificate under Act XXVII of 1860

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——————s 4—*Certificate for collection of debts—Effect of certificate against debtors—Cause of action.*] A judgment debtor sued for a declaration that the son of the deceased decree holder, to whom a certificate had been granted under Act XXVII of 1860 in respect of the debts due to his father's estate was not competent to apply for execution of the decree, as being illegitimate, he was not the legal representative of the deceased decree-holder *Held* that the suit was not maintainable, the certificate under Act XXVII of 1860 being, under s 4 of the Act conclusive of the defendant's representative character, and a full indemnity to all persons paying their debts to him

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——————XLV, s 182—*Giving false "information" to a public servant*] *M* falsely informed the Collector of a District that certain zamindars had usurped possession of certain land belonging to Government, with the intent "to give trouble to such zamindars, and waste the time of the public authorities" *Held* that, inasmuch as such information was no more than an expression of a private person's belief, that the Collector might, if he chose sustain a civil suit with success against such zamindars, and as, had the Collector agreed with the informant, the result would not have been that he would have used his lawful power as a Collector or as a Magistrate to the injury or annoyance of such zamindars or that he would have done anything he ought not to have done, *M* had not committed an offence under s. 182 of the Indian Penal Code

Empress of India v Madho 498

——————ss 193, 196—*False evidence—Using evidence known to be false—Separate trial*] Where several persons are accused of having given false evidence in the same proceeding, they should be tried separately.

A, *B*, *D*, and *P* were jointly tried, *A* in respect of three receipts for the payments of money, produced by him in evidence in a judicial proceeding, on three charges of falsely using as genuine a forged document and on three charges of using evidence known to be false; *A*, *B*, *D*, and *P* on charges of giving false evidence in the same judicial proceeding as to such payments The Court (STRAIGHT, J.), being unable to say that the accused persons had not been prejudiced in their defence by having been improperly tried together, set aside the convictions and ordered a fresh trial of each of the accused separately

Empress of India v Anant Ram 203

——————s 211—*False charge—Act X of 1872 (Criminal Procedure Code), ss 146 147*] Where a Magistrate dismisses a complaint as a false one under s 147 of the Criminal Procedure Code, and decides to proceed against the complainant under s 471 for making a false charge, he is not bound before so proceeding to give the complainant an opportunity of substantiating the truth of the complaint, by being allowed to produce evidence before him

Empress of India v Bhawani Prasad 182

——1865—X, ss 190, 191—*Intestate—Sale of property of intestate in execution of decree against some of his heirs—Title to sale proceeds—Letters of administration*] Sued some of the heirs to a person governed by the Indian Succession Act, 1865, who died intestate, such heirs being in possession of a part of the estate of the deceased, for a debt due to him by the deceased, and obtained a decree against

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such persons. In execution of this decree property belonging to the deceased was sold. Before the sale-proceeds were paid to *S*, *R*, an heir to the deceased, obtained in the District Court letters of administration to the estate of the deceased, and an order for payment to her of such sale-proceeds. Thereupon *S* sued *R* for such sale-proceeds and to have the District Court's order directing payment thereof to her set aside. *Held* that, with reference to ss. 190 and 191 of the Indian Succession Act, 1865, the decree obtained by *S* against persons who did not legally represent the estate of the deceased, and the proceedings taken against such persons in execution of such decree, gave *S* no title to the sale-proceeds which formed part of the estate of the deceased, and the suit was therefore not maintainable.

Sukh Nandan *v.* Kennick 193

ACTS—1865—XI, s. 6. *See* Small Cause Court suit ... 152, 416

———1866—XX., ss. 35(*c*), 49, 68, 88—*Registration—Presentation of document by Agent—Power of attorney not executed and authenticated as required by law —Validity of registration.*] A document bearing the certificate required by law showing that it has been registered must be treated as a registered document, notwithstanding the registration procedure may have been defective.

Held, therefore, where a document bore the certificate required by s. 68 of Act XX of 1866 showing that it had been registered, that, notwithstanding that it had been presented for registration by the agent of the person executing it under a power of attorney not recognizable under that Act for the purposes of s. 34, it must be treated as a registered document. *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* and *Muhammad Ewaz* v. *Birj Lal* referred to.

A document was presented for registration by the agent of the person executing it authorized by a power of attorney not recognizable under the registration law, and was admitted to registration. *Held* that the person executing such document could not be allowed to object to the validity of its registration by reason of its having been registered under a power of attorney not recognizable under the registration law, such person being herself responsible for the defect in registration *Har Sahai* v. *Chunni Kuar* followed.

Ikbal Begam *v.* Sham Sundar 384

——1869—IV, ss. 3 (2), 55. *See* High Court's appellate jurisdiction, 306

——————— ss. 16, 36—*Alimony* pendente lite—*Decree* nisi *for dissolution of marriage—Application to make decree absolute—Arrears of alimony.*] A husband, who had obtained a decree *nisi* for the dissolution of his marriage with his wife on the ground of her adultery, applied to have such decree made absolute. At the time this application was made arrears of alimony *pendente lite* were due to the wife. The Court (STRAIGHT, J.) refused to make such decree absolute until such arrears were paid.

DeBretton *v.* DeBretton 295

——————ss. 51, 52—*Suit for dissolution of marriage on the ground of wife's adultery——Evidence of adultery—Co-respondent.*] The co-respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery was summoned by the petitioner in such suit as a witness. The Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with, him to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held*, under such circumstances, that the co-respondent had not

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"offered" to give evidence within the meaning of s. 51 of the Indian Divorce Act, 1869, and therefore his evidence was not admissible.

De Bretton v. De Bretton 49
ACTS—1869—XVIII, s. 48. *See* Act I of 1879, s. 68 216
———1870—VII, s. 7, art iv, cl. iv. *See* Jurisdiction 320
——— ———s. 34. *See* Act I of 1879, s. 68 216
——— 1871—VI, ss. 20, 22. *See* Jurisdiction 320
———s. 24—*Hindu law—Muhammadan law—Convert—"Justice, equity, and good conscience."*] To entitle a person to have the Hindu or Muhammadan law applied to him under the first paragraph of s. 24 of Act VI of 1871, he must be an orthodox believer in the Hindu or Muhammadan religion. The mere circumstance that he calls himself, or is called by others, a Hindu or Muhammadan, as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871 according to justice, equity, and good conscience.

B, alleging that his family was a joint undivided Hindu family, sued *R* his father for a declaration that certain property was joint ancestral property, and for partition of his share according to the Hindu law of inheritance of such property, *viz.*, one moiety. *R* set up as a defence to the suit that the members of the family were Muhammadans and were therefore not governed by the Hindu law. The evidence in the suit established that the members of the family were neither orthodox Hindus nor Muhammadans. It also established that the Hindu law of inheritance had always been followed in the family.

Held, following the principle enunciated above, that the family not being Hindus nor Muhammadans, the rule of decision applicable to the suit was neither Hindu nor Muhammadan law, but justice, equity, and good conscience; that, the Hindu law of inheritance having always been followed in the family, it was justice, equity, and good conscience to apply that law to the suit; and that therefore *B* was entitled to demand partition of half of the family estate.

Abraham v. *Abraham* referred to.

Raj Bahadur v. Bishen Dayal 343
———VIII, ss 58, 85—*Registration—Omission to endorse signature of person admitting execution—Validity of registration—Hindu law—Gift—Possession—Construction of instrument of gift*]—*S*, on the 23rd September, 1874, executed an instrument of gift in favour of his two daughters and his adopted son, whereby he gave them "his houses and shops, and other moveable and immoveable property, and his loan transactions" in equal one-third shares. At this time he was possessed of a one-third share in a certain partnership business. As *S* was unable to appear at the registration office, by reason of sickness, *N*, his adopted son, on the same day presented such instrument for registration, and applied for the issue of a commission for his examination, which the registering officer issued. The commissioner went to *S's* house on the next day, but before he arrived *S* had died. He examined the attesting witnesses to such instrument, who stated that it had been executed by *S*, and he was informed by *N* that it had been so executed. On the next day *N* and the attesting witnesses and the writer of such instrument appeared before the registering officer, and the witnesses and writer were examined by him. Being satisfied that *S* had executed such instrument, the registering officer admitted registration, recording that the execution was admitted by *N*. *N's* signature was not endorsed on such instrument. *M*, one of *S's* daughters, subsequently sued *N* for one-third of her father's

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property, including his share in such partnership business, basing her suit on such instrument. *Held* that, inasmuch as *N* had admitted at the time of registration of such instrument that it had been executed by *S*, its registration was not invalidated by the mere fact that *N's* signature had not been endorsed thereon. Also that, inasmuch as the donor had relinquished the subject of the gift, so far as he could, and had vested it in the donees, possession under the gift had passed to *M*. Also, on the construction of such instrument, that it did not give *M* a share in her father's partnership business.

Man Bhari *v* Naunidh — 40

ACTS—1871—IX. s. 23 *See* Act XV. of 1877, s. 23, and sch ii., No. 143 493

——————sch. ii., No. 167. *See* Execution of decree 137

——————1872—I., s. 24 – *Confession—Proof of oral confession.—Confession to "panchayat" caused by threat.*] The matter before a "panchayat" was whether *M* and *K* had murdered *B*, and thereby disqualified themselves from further intercourse with the rest of their brotherhood. *M* and *B* made certain statements before the *panchayat*, which it was afterwards sought to prove against them on their trial for the murder of *B* as confessions corroborating the evidence of an approver. The witnesses called to prove these "confessions" did not state specifically what was said by *M* and *K* before the *panchayat*. One witness, a member of the *panchayat*, said: "*M* confessed and *K* acquiesced." Another witness, also a member of the *panchayat*, said: "*M* and *K* were taxed with taking *B's* house, upon which both admitted having murdered him." The same witness also said: "The admissions were not taken down." It appeared that it was not till at the sixth meeting of the *panchayat*, and when *M* and *K* were threatened with excommunication from caste for life, that they made such statements *Held* that, if the statements attributed to *M* and *K* had been actually made, and assented to, and this fact had been duly proved, the provisions of s. 24 of Act I of 1872 could not be pleaded against their admissibility on the ground that such statements had been caused by such threat, for the members of the *panchayat* were not in authority over *M* and *K* within the meaning of that section, nor was there any threat made having reference to any charge against them The statements, however, could not be accepted as sufficient in themselves to corroborate the evidence of the approver, or to support the conviction of *M* and *K* for the murder of *B*. The statements were in general terms and represented only the impression conveyed by what might have been said to the mind of the witnesses. It was always essential that the Court should know as nearly as possible what were the words used by the supposed confessors, and what were the questions or matters in regard to which they were said It might have been that the words ascribed to *M* and *K* taken with the questions put and the exact subject-matter of the inquiry did not amount to a confession of the guilt believed by the hearers to have been confessed.

Empress of India *v.* Mohan Lal 46

——————ss. 25, 26, 27—*Confession made to a Police officer.*] *P*, accused of the murder of a girl, gave to a Police officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had thrown down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the Police officer to the place where the girl's body had been found, and pointed out the anklets.

Held that such statements, being confessions made to a Police officer, whereby no fact was discovered, could not be proved against *P*.

Observations on the use of confessions made to Police officers.

Reg. v. *Jora Hasji* and *Empress* v. *Rama Birapa* referred to.

Empress of India *v* Pancham 198

——————s. 91—*Debt—Promissory note—Written acknowledgment of debt—Oral acknowledgment—Evidence of debt.*] *H* lent Rs. 85

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to *D* on a pledge of moveable property. *D* repaid *H* Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt, Rs. 45, was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance, and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for Rs. 45, and the property was returned to him. *H* subsequently sued *D* on such oral acknowledgment for Rs. 45, ignoring the promissory note, which being insufficiently stamped was not admissible in evidence. *Held* that the existence of the promissory note did not debar *H* from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt.

Hira Lal *v.* Datadin 135

ACTS—1872—IX., ss. 2 (*d*), 15, 19, 25.—*Contract—Bond—Coercion—Consideration.*] A person, while under arrest in execution of a decree which had been made against him by a Court having no jurisdiction to make it, gave the holder of such decree a bond for the amount of such decree *plus* a small sum paid for him for the stamping and preparation of such bond, in order that he might be released from such arrest. *Held* that such bond was given under duress, and that it was executed without consideration, the small sum paid by the holder of such decree for preparing and stamping the bond not being in any legitimate sense of the phrase "consideration" for such bond, and therefore such bond was void.

Banda Ali *v.* Banspat Singh 352

——— ss. 13, 20—*Bill of exchange—Mistake—Void agreement—Laches.*] On the 3rd March, 1881, *N* drew a bill in English at Cawnpore in favour of *F* on a Calcutta firm and gave it to *F's* agent, who did not understand English. *F's* agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F* subsequently sued *N* for the money he had paid for the bill on the ground that his agent had asked *N* for a bill drawn on himself and not one drawn on the Calcutta firm. *N* asserted in defence to the suit that *F's* agent had not asked for a bill drawn on himself but merely for a bill on Calcutta.

Held that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F* could not recover the amount of the bill from *N*, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.

Nightingale *v.* Faiz-ulla 334

——— ss 69, 70. *See* Small Cause Court suit 152

——— ss 239, 240—*Partnership—Loan of money.*] *Held*, on the construction of the agreement in this case, that such agreement did not create a "partnership" between the parties thereto, as defined in s. 239 of Act IX. of 1872, but was an agreement of the kind mentioned in s. 240 of that Act.

Bhaggu Lal *v.* DeGruyther 74

——— X., ss. 41, 44, 46—*Covenanted Magistrate of the third class on tour in Division of a District—Subordination to Magistrate of the Division—Act X of* 1872 (*Criminal Procedure Code*), *s.* 284.] A Magistrate of a Division of a District made over, under s. 44 of Act X. of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction, found the accused person guilty, and considering that the accused person ought to receive more severe punishment than he was competent to inflict, under the provisions of s. 46 of Act X of 1872, submitted his proceedings to the former. The former thereupon, under the provisions of the same section passed sentence on the accused person.

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Held that the latter Magistrate was subordinate to the former, within the meaning of s. 41 of Act X of 1872, and the procedure of the Magistrates was therefore according to law.

Held also that, assuming that the latter Magistrate was not "subordinate" to the former, the provisions of s 284 of Act X of 1872 would not have been applicable, as those provisions do not refer to the illegality of a sentence or to the case of a Magistrate transferring a case who has no power of transfer, but to the invalidity of a conviction for want of jurisdiction.

Empress of India *v.* Kallu 366

ACTS——1872——X ss. 74, 83 *See* Jurisdiction... 141

——————ss. 146, 147. *See* Act XLV. of 1860, s. 211 ... 182

——————ss. 196, 197, Explanation—*Commitment on a charge of adultery—Withdrawal of prosecution—Discharge of accused.*] A Magistrate, having committed a person for trial by the Court of Session on a charge of adultery, immediately afterwards, on the representation of the prosecutor that he wished to withdraw from the prosecution, discharged the accused. *Held* that the order of discharge was bad, as under ss. 196 and 197, Explanation, Criminal Procedure Code, a commitment once made can be quashed by the High Court only.

Empress of India *v.* Jangbir 150

——————s. 272.—*Appeal by Local Government from judgment of acquittal.*] It is not because a Judge or a Magistrate has taken a view of a case in which the Local Government does not coincide, and has acquitted accused persons, that an appeal by the Local Government must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice, by putting in force the arbitrary powers conferred on it by s. 272 of the Criminal Procedure Code. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public.

Held, therefore, the Local Government having appealed from an original judgment of acquittal of a Sessions Judge, that, as such judgment was an honest and not unreasonable one, of which the facts of the case were susceptible, such appeal should be dismissed.

Empress of India *v.* Gayadin 148

——————s. 359.—*Witness for the defence—Failure to attend—Refusal to re-summon.*] On the 30th March, 1881, an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused an application by the accused for the issue of a second summons to such witness, with reference to s. 359 of Act X of 1872, on the ground that such application was not made in "good faith." *Held* that the provisions of s. 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April, and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness.

Empress of India *v.* Rukn-ud-din 53

——————ss. 452, 453.—*Joinder of charges—Offences of the same kind committed in respect of different persons.*] *M* was accused of cheating *G* on two different occasions and also of cheating *K* on a third occasion. The three offences were committed within one year of each other; and *M* was charged and tried at the same time for the three offences. *Held* that such joinder of charges was irregular, inasmuch as the combination of three offences of the same kind, for the purpose of one trial, can only be, where such offences have been committed in respect of one and the same person and not against

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different prosecutors, within the period of one year, as provided in the Criminal Procedure Code.

Empress of India *v.* Murari 147

ACTS——1872—X, s. 489.—*Security for keeping the peace—Magistrate of the District—Appellate Court.*] The Magistrate of a District, when exercising the powers of an Appellate Court, is competent to make an order under s. 489 of the Criminal Procedure Code requiring the appellant to furnish security for keeping the peace.

Empress of India *v.* Kamta Prasad 212

——1873—X. *See* Arbitration 283

——ss. 8—12. *See* Arbitration 302

——XV, s. 43. *See* Act XV of 1877, sch. ii, No. 120 102, 339

——XVIII., s. 8—*Occupancy-tenant—Continuous occupation.*] A tenant who has occupied or cultivated alluvial land, whenever such land was capable of occupation or cultivation, for twelve years, acquires by such occupation or cultivation a right of occupancy in such land.

Lachman Prasad *v.* Bal Singh 157

——s. 9 *See* Act XII. of 1881, ss. 2, 9 371

——ss. 36-39 *See* Res judicata 11

——ss. 148, 183, 189—*Landholder and tenant—Suit for arrears of rent—Right to rent disputed by third person—Appeal by intervenor.*] *K* sued *B* for arrears of rent, such arrears not exceeding Rs. 100. His right to receive rent was disputed by *H*, a third person, who was made a defendant under the provisions of s 148 of Act XVIII of 1873. The suit was tried by an Assistant Collector of the second class, who decided that *K* was entitled to the rent *H* and *B* appealed to the Collector, who decided that *H* was entitled to the rent. *K* thereupon appealed to the District Judge, who affirmed the decision of the Collector. *K* then appealed to the High Court.

Held that the Collector was not competent to entertain an appeal by *H*; that, as between *K* and *B*, all that the Collector could decide was whether or not *K* was entitled to the amount of rent claimed; that the District Judge had no jurisdiction to entertain *K's* appeal; and that *K's* appeal to the High Court was not entertainable, the District Judge not having decided any question of proprietary right that would justify such an appeal.

Kishna Ram *v.* Hingu Lal 237

——XIX, s. 125 *See* Act XII. of 1881, ss. 14, 95 (*l*) ... 515

——1877—I, s 21.—*Agreement to refer to arbitration—Award—Suit in respect of matter referred barred*] The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held* that, under these circumstances, the further hearing of such suit was barred.

Salig Ram *v.* Jhunna Kuar 546

——s 42. *See* Act X of 1877, ss. 13, 43 261

——III, ss. 17, 49.—*Unregistered Bond for the payment of money hypothecating immoveable property—Admissibility in evidence of the bond in support of a claim for money—Mortgage—Act XV of 1877 (Limitation Act), sch ii, No. 66—Single Bond*] On the 3rd February, 1871, the defendants, having borrowed Rs 1,000 from the plaintiffs, executed in favour of the latter an instrument in which they mortgaged, by way of conditional sale, certain immoveable property as security for the loan, and in which it was provided that they should pay certain interest on such sum annually and should pay such sum on the expiration of five years from the date of such instrument, and in the event of failure in these respects that the plaintiffs might apply for foreclosure. On the 18th January, 1879, the plaintiffs sued the defendants for the balance of such sum and interest, waiving their

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claim on such property, and suing for such balance as a simple debt, as such instrument was not registered. *Held*, following *Sheo Dial* v. *Prag Dat Misr*, that, inasmuch as such instrument involved a personal obligation of the defendants distinct and severable from the obligation in respect of such property, such instrument, notwithstanding it was not registered, was admissible as evidence in support of the claim to enforce the money-obligation; and it was also admissible in proof of the fact that the debt was not exigible from the defendants until on and after the expiration of five years from the date of the loan. *Held* also that the limitation period in No. 66, sch. ii of Act XV. of 1877, was not applicable, as the claim of the plaintiffs was not based on a single bond, that is to say a bill or written engagement for the payment of money, without a penalty.

Lachman Singh v. Kesri 3

ACTS——1877——III, ss. 28, 49, 60.—*Mortgage—Covenant to give the mortgagee possession—Suit for possession after expiration of term—Registration of mortgage-deed in district in which the mortgaged property is not situate—Admissibility of document in evidence.*] An instrument of mortgage on land, which required to be registered, was presented for registration to a Registrar within whose district no portion of the land was situate, and was registered by such Registrar. In a suit to enforce such mortgage it was objected that such instrument, not having been properly registered, could not be received in evidence. *Held*, following the opinion of Broughton, J., in *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu*, that when a document which purports to have been registered is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law. Moreover, that the mortgagor could not be allowed to take advantage of an objection which would not have been available but for his own wrongful act.

A mortgagor covenanted to give the mortgagee possession of the mortgaged property, but did not do so, and the mortgagee consequently sued him for possession, but not until the term of the mortgage had expired. The mortgagor set up as a defence to such suit that it was not maintainable after the expiration of the mortgage-term. This defence was rejected on the ground that the mortgagor had, by his breach of the mortgage-contract, put himself out of Court.

Har Sahai v. Chunni Kuar 14

——————s. 49—*Registration—Unregistered indigo "sattah"—Admissibility in evidence of claim for damages.*] *S* gave *M* a lease of certain land, which was required by law to be registered, but which was not registered, in which it was stipulated that, if he failed to deliver any portion of such land, he should pay damages at a certain rate per bigha in respect of the portion not delivered, and in which such land was hypothecated as security for the payment of such damages. *S* having failed to deliver a portion of such land, *M* sued him for damages in respect of such portion according to the terms of the lease, not seeking to enforce the hypothecation, as the lease was not registered, but seeking only a money-decree. *Held* that the lease, being unregistered, could not be received as evidence even of *S's* personal liability thereunder. *Sheo Dial* v. *Prag Dat Misr* distinguished.

Martin v. Sheo Ram Lal 232

——————s. 50.—*Registered and unregistered documents.*] *Held* (STUART, C. J., doubting) that under the provisions of s. 50 of the Registration Act, 1877, documents registered under former Registration Acts do not take precedence over all unregistered documents, of which at the time of their execution registration was either optional or not required. *Lachman Das* v. *Dip Chand* observed on.

Sri Ram v. Bhagirath Lal 227

——————ss. 58-60, 87.—*Registration—Unregistered conveyance—Bond confirming conveyance—Registration of conveyance instead of bond—"Defect of procedure"—Claim to attached property—Suit to establish*

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judgment debtor's right—Burden of proof.] A decree-holder sued to establish that certain property was the property of *W*, his judgment-debtor, such property being claimed by *A* as his. He proved that for five years and more *W* had been in possession of such property as ostensible owner. *Held* that, this being so, it rested with *A* to prove his title.

A deed of sale, which required to be registered, not having been registered, and the time for presenting it for registration having expired, the vendor, in order to avoid the effect of the deed of sale being unregistered, gave the purchaser a bond confirming such deed. The bond, with the deed of sale annexed thereto, was presented for registration. By mistake or for some other reason the particulars to be endorsed on a document admitted to registration, and the certificate showing that a document has been registered, were endorsed on the deed of sale and not on the bond.

Held that, assuming that the bond had been registered, it was doubtful whether such an obvious attempt to defeat the provisions of the Registration Law should be permitted to succeed; that, whether there had been a mistake and the certificate of registration really applied to the bond or not, the provisions of ss. 58, 59, and 60 of the Registration Act had not been complied with, and the bond was to all intents and purposes unregistered; and that the defect was not a "defect of procedure" within the meaning of s. 87, and which could be passed over

Mathura Das *v* Mitchell 206

ACTS——1877—X, s. 13—*Res judicata—"Matter in issue"—"Subject-matter" of suit—Bond—Interest*] The obligee of a bond payable by instalments sued the obligor for four instalments, claiming with reference to the terms of such bond interest on such instalments from the date of such bond. The obligor contended in that suit that, on the proper construction of the bond, the interest on such instalments should be calculated from the dates of default. The obligee obtained a decree for interest as claimed. The obligee subsequently again sued the obligor for four instalments, again claiming interest on such instalments from the date of such bond. The obligor contended again in the second suit that interest should only be calculated from the dates of default. *Held* that the question as to the date from which interest due on the defaulting instalments was exigible under the terms of such bond was *res judicata*

It is the "matter in issue," not the "subject-matter" of the suit, that forms the essential test of *res judicata* in s. 13 of Act X of 1877.

Pahlwan Singh *v* Risal Singh 55

——————*Res judicata*] *H*, the proprietor of a one-third share of a certain undivided estate, made a gift of such share to *P*. He subsequently in February, 1875, gave a mortgage of such share, in his capacity as *P's* guardian, to *N* and *S*, the two other co-sharers of such estate. In March, 1878, *P*, having attained his age of majority, brought a suit, as a co-sharer of such estate, under such gift, against *N* and *S* for possession of certain land appertaining to such estate, on the ground that they were using such land as if they were the sole proprietors thereof. The lower appellate Court, observing that such land was the property of the three co-sharers, that the mortgage of *P's* rights to *N* and *S* did not affect those rights as such, and that *N* and *S* were not justified in using such land as if they were the exclusive proprietors thereof, gave *P* a decree for possession of one-third share of such land *N* and *S* appealed to the High Court on the ground that *P* should not have been awarded possession, as they were in possession of such land as mortgagees. The High Court remanded the cases for the determination of the issue thus raised by *N* and *S*; and the lower appellate Court found that *N* and *S* were in possession of *P's* share of such estate as mortgagees under the mortgage made by *H* above referred to, and of such land as such. *P* did

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not take any objection to this finding; and it was adopted by the High Court and embodied in its final decree. In October, 1879, *P* sued *N* for possession of his share in such estate, claiming under the gift from *H*, and alleging that the mortgage of such share by *H* to *N* was invalid. *Held* that, inasmuch as such mortgage was matter substantially in issue in the former suit, the matter in issue in the second suit was *res judicata* under Explanations I. and II., s. 13 of Act X. of 1877.

Nirman Singh *v.* Phulman Singh 65

ACTS——1877—X, s. 13—*Suit by Hindu father for compensation for the loss of his daughter's services in consequence of her abduction—Compensation for costs of prosecuting abductor—Res judicata*]—A Hindu sued for compensation for the loss of his daughter's services in consequence of her abduction by the defendant, and for the costs incurred by him in prosecuting the defendant criminally for such abduction. The defendant was convicted on such prosecution. *Held* that the decision of the Criminal Court did not operate under s. 13 of Act X of 1877 to bar the determination in such suit of the question whether the defendant had or had not abducted the plaintiff's daughter. Also that the plaintiff was entitled to recover the costs of such criminal proceedings.

The daughter in this case was a married woman, who had been deserted by her husband, and at the time of her abduction was living with the plaintiff, her father.

Held by STUART, C. J., that the suit by the father for compensation for the loss of his daughter's services in consequence of her abduction was under the circumstances maintainable.

Held by OLDFIELD, J., that a suit by a Hindu father for the loss of his daughter's services in consequence of her abduction is not maintainable.

Ram Lal *v.* Tula Ram 97

——————] *B*, who held a decree for money against *I*, caused certain property to be attached in execution of such decree as the property of his judgment-debtor. *M*, the wife of *I*, objected to such attachment, claiming such property as her own. Her objection was disallowed, and she consequently brought a suit against *B* to establish her right to such property. She died while that suit was pending, leaving by will such property to her sons. That suit proceeded in the names of her sons, who claimed such property under such will. The lower Court only decided in that suit that such property belonged to *M*, and not to *I*, and it was therefore not liable to be sold in execution of *B's* decree against the latter. They did not consider the question whether *M's* sons were entitled to such property under their mother's will. In second appeal in that suit *B* contended that *I*, as a heir to *M*, was entitled to a fourth share of such property, and such share was liable to be sold in execution of such decree. *M's* sons did not contend before the High Court that they were entitled to the whole of such property under their mother's will to the exclusion of *I*. The High Court allowed *B's* contention. *B* brought a fourth share of such property to sale in execution of his decree and purchased it himself. Thereupon *M's* sons sued him for such share claiming it under their mother's will. *Held* that their mother's will was a matter which should have been made a ground of defence by *M's* sons in the course of the trial of the second appeal in the former suit between them and *B*, and that, not having been so made, it was *res judicata* in the sense of s. 13, Explanation II. Act X of 1877.

Sultan Ahmad *v.* Maula Bakhsh 21

——————*Res judicata—Act X of* 1872 (*Civil Procedure Code*), *s.* 542—*Plea taken for the first time in second appeal.*]. *Held* that not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542 of Act X of 1877, but that even when such plea has not been

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urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands, or after a remand for findings of fact.

Muhammad Ismail *v.* Chattar Singh 69

ACTS——1877——X, ss. 13, 43—*Act I of* 1877 (*Specific Relief Act*), *s* 42—*Res judicata—Misjoinder.*] In December, 1878, *H*, a Hindu widow, in possession, by way of maintenance, of a certain estate, of which *R* owned one-third, and *P*, *B*, and *S* one third jointly, made a gift thereof to *N* *H* died in January, 1879. In February, 1879, *R* and *P*, *B*, and *S* joined in suing *N* for a declaration of their proprietary right to two-thirds of the estate and to have the deed of gift set aside. The Court trying this suit treated it as one for a mere declaration of right, and dismissed it, with reference to the provisions of s. 42 of the Specific Relief Act, 1877, on the ground that the plaintiffs had omitted to sue for possession, although they were not in possession and were able to sue for it. In November, 1879, *R* and *P*, *B*, and *S* again joined in suing *N*. In this suit they claimed possession of two-thirds of the estate and to have the deed of gift set aside.

Held by the Full Bench (reversing the judgment of PEARSON, J., and affirming that of OLDFIELD, J.,) that the decision in the former suit was no bar to the determination in the second suit of the question as to the validity of the deed of gift.

Per STUART, C. J., and STRAIGHT and OLDFIELD, JJ., that the causes of action in the two suits being different, the second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Per TYRRELL J., that the plaintiffs being entitled to only one remedy in the former suit, the provisions of s. 43 were not applicable to the second suit.

Held by the Full Bench that there was no misjoinder of plaintiffs in the second suit.

S. A. No 1050 of 1879 distinguished.

Ram Sewak Singh *v.* Nakched Singh 261

——————s 17 (*a*). *See* Jurisdiction 422

——————ss. 25, 57, 588 (6)—*Institution of suit in wrong Court—Transfer of suit—Power of the Court to which suit is transferred to return plaint to be presented to the proper Court—Jurisdiction—Appeal.*] A District Court transferred for trial a suit instituted in a Court subordinate to it to another Court subordinate to it. The Court in which the suit was instituted was not the one in which the suit should have been instituted, and consequently the Court to which it was transferred made an order dismissing it, and directing the return of the plaint for presentation to the proper Court. *Held* that such order must be taken to have been passed under s. 57 of the Civil Procedure Code, and was therefore appealable under s. 588 (6); and that the defect of jurisdiction arising out of the institution of the suit in the wrong Court was not cured by the transfer of the suit.

Pachaoni Awasthi *v.* Ilahi Bakhsh 478

——————s 25. *See* Partnership 437

——————s. 43] *J* had a right to share in a certain estate, as an heir to her father, and also as an heir to her brother. She transferred such right by sale to *H*. *H* sued *S*, who had acquired the whole estate by purchase at sales in execution of decrees against the other heirs of *J's* brother, for *J's* share as one of her brother's heirs in such estate, and obtained a decree. *H* then sued *S* for *J's* share as one of her father's heirs in such estate. *Held* that *H* was debarred from bringing the second suit by the provisions of s. 43 of Act X of 1877.

Shafkat-un-nissa *v.* Shib Sahai 171

——————s. 43—*Mortgage—Decree enforcing lien—Suit against purchaser to enforce decree*] The obligee of a bond for the payment of money, in which certain property was mortgaged as collateral security, sued the obligor for the money due on such bond, claiming

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the enforcement of such mortgage. At the time the suit was brought such property was in the possession of a third person, who had purchased it at a sale in execution of a money-decree against the obligor of such bond. The obligee did not make the purchaser a defendant to the suit. He obtained a decree in the suit for the sale of such property. Being resisted in bringing it to sale by the purchaser, he sued the purchaser to have it declared that such property was liable to be sold under his decree. *Held* that such second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Bahraichi Chaudhri *v.* Surju Naik 257

ACTS——1877——X, s. 43—*Lease by usufructuary mortgagee of mortgaged property to mortgagor—Hypothecation of mortgaged property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court.*] The usufructuary mortgagee of certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the mortgagor in the Civil Court to recover the amount of such decree by the sale of the land, claiming under the hypothecation. *Held* that the second suit was not barred by the provisions of s. 43 of Act X of 1877.

Banda Hasan *v.* Abadi Begam 136

——————s. 43—*Lease by usufructuary mortgagee of mortgaged property to mortgagor—Hypothecation of mortgaged property as security for rent—Suit for rent in Revenue Court—Suit for enforcement of lien in Civil Court.*] The usufructuary mortgagee of certain land granted a lease of such land to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the transferee of such land in the Civil Court to recover the amount of such decree by the sale of the land, claiming under the hypothecation. *Held*, following *Banda Hasan* v. *Abadi Begam*, that such claim was not barred by the provisions of s. 43 of Act X of 1877; that it could only be made through the medium of the Civil Court; and that the shape in which it was presented was perfectly regular.

Imami Begam *v.* Gobind Prasad 318

——————ss 45, 578—*Pre-emption—Misjoinder—Irregularity not affecting merits or jurisdiction*]—The sons of *R* and of *K* and of *S* possessed proprietary rights in two mahâls of a certain mauza. *P* possessed proprietary rights in one of those mahâls. In April, 1879, the sons of *R* sold their proprietary rights in both mahâls to *G*. In August, 1879, the sons of *K* sold their proprietary rights in both mahâls to *G*. Later in the same month the sons of *S* sold their proprietary rights in both mahâls to *N*. *G* sued *N* to enforce a right of pre-emption in respect of the sale to the latter, and obtained a decree. *P* then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the mahâl of which he was a co-sharer, joining as defendants *G* and *N* and the vendors to them. *G* alone objected in the Court of first instance to the frame of the suit. That Court overruled the objection and gave *P* a decree. The lower appellate Court reversed this decree on the ground of misjoinder.

Held that in respect of *G* there was no misjoinder, but that, in respect of the other defendants there was misjoinder of both causes of action and parties. Inasmuch as, however, *G* alone objected to the frame of the suit, and the defeat did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court ought not, regard being had to s. 578 of Act X of 1877, to have reversed the decree of the Court of first instance by reason of such defect.

Kalian Singh *v.* Gur Dayal 161

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ACTS——1877——X, ss. 108, 540.—*Ex-parte decree—Appeal*] *Held* by STUART, C. J., and STRAIGHT and TYRRELL, JJ., (OLDFIELD and BRODHURST, JJ., dissenting) that a defendant against whom a decree has been passed *ex-parte*, and who has not adopted the remedy provided by s. 108 of the Civil Procedure Code, cannot appeal from such decree under the general provisions of s. 540.

Lal Singh *v.* Kunjan 387

——————s. 206. *See* Act XV. of 1877, sch. ii, No. 178 ... 23

——————s. 230.—*Execution of decree*]—The parties to a decree presented a petition to the Court executing the decree stating that it had been agreed between them that the amount of the decree should be paid by ten monthly instalments of Rs. 500 each. The Court made an order directing that such petition should be filed. *Held* that this order did not amount to one directing payment of money to be made at a certain date, which would give a fresh period of limitation under s. 230 (*b*) of the Civil Procedure Code.

Bal Chand *v.* Raghunath Das 155

——————s 231. *See* Act XV of 1877, sch. ii., No. 179 ... 72

——————ss. 214, 244. *See* Pre-emption... 420

——————ss. 244 (*c*), 281—*Execution of decree—Decree against firm—Attachment of property as property of firm—Claim by partner to property as private property—Appeal.*] The holder of a decree against a firm caused certain property to be attached in execution of the decree as the property of the firm. One of the partners in the firm objected to the attachment on the ground that such property was not the property of the firm, but was his private property. The Court disallowed the objection, whereupon such partner appealed from the order disallowing the objection. *Held* that such order was not one under s. 244 (*c*) of Act X of 1877, but under s. 281, and was therefore not appealable.

Abdul Rahman *v.* Muhammad Yar 190

——————s. 258. *See* Act XV. of 1877, sch. ii., No. 179 (6) ... 316

——————ss. 274, 289, 290, 311—*Execution of decree—Time of sale—Irregularity in proclamation of sale.*] *Held* that the fact of a sale of immoveable property in execution of a decree having taken place before thirty days from the proclamation of sale being made on the property had expired was not a material irregularity in the publication of the sale. *Mohunt Megh Lall Pooree* v *Shib Pershad Madi* dissented from.

Rahchandar Bahadur *v.* Kamta Prasad 300

——————s. 276.—*Award directing execution of conveyance—Decree in accordance with award—Execution of conveyance—"Private alienation."*] By agreement between *L* and *Q*, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that *L* should transfer certain property to *Q* by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against *L*. After the attachment *L*, in compliance with the decree made in accordance with the award, executed a conveyance of such property to *Q*.

Held by the Full Bench (affirming the decision of STRAIGHT, J., and reversing that of SPANKIE, J.,) that such conveyance was not a "private alienation" in the sense of s. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment.

Qurban Ali *v.* Ashraf Ali... 219

——————s. 281. *See* ss 241 (*c*), 281 190

——————ss. 285, 311. *See* Execution of decree 350

——————ss. 311, 320. *See* Execution of decree ... 382

——————s. 320—*Rules prescribed by the Local Government under s. 320 Meaning of "decrees for the recovery of money."*] *Held* that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land,

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is a decree for money within the meaning of the Rules prescribed by the Local Government under s. 320 of Act X. of 1877.

Birch v. Rati Ram 115

ACTS——1877——X, s. 320—*Rules prescribed by the Local Government under s. 320—Meaning of "with effect from the 31st October, 1880."*] *Held* that effect cannot be given to the Rules prescribed by the Local Government under s. 320 of Act X. of 1877, unless an order for sale has been made on or after the 1st October, 1880.

Hafiz-un-nissa v. Mahadeo Prasad 116

——— ——— ———s. 351.—*Insolvent judgment-debtor.*]—A judgment-debtor applied to be declared an insolvent. Certain of the claims against him were claimed under decrees. The Court of first instance refused the application, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in s. 351 of the Civil Procedure Code, on the ground that the applicant had contracted the debts for which such decrees had been made dishonestly, and that section gave the Court in such a case a discretionary power to refuse the application.

Held that the Court of first instance had taken an erroneous view of s. 351, and had assumed a wider discretion than the law conferred on it. If a person making an application to be declared an insolvent has not brought himself within clauses (*a*), (*b*), (*c*) or (*d*) of that section, then the Court has no discretion on other grounds to refuse the application. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making false statements in the application are all dealt with in s. 351, and are intended to confine the category of acts of misconduct that will debar the applicant from obtaining the relief and protection he asks.

Salamat Ali v Minahan 337

——— ——— ———Ch XXVIII. *See* Arbitration 302

——— ——— ———ss. 520, 521,522. *See* Arbitration 283

——— ——— ———s. 540 *See* ss. 108,540 387

——— ——— ———s. 542. *See* s. 13 69

——— ——— ———s. 561—*Time for filing objections.*]—The notice of objections referred to in s. 561 of the Civil Procedure Code must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties.

Deo Kishen v. Maheshar Sahai 248

——— ——— ———*Incidental decision of issue—Appeal—Objection by respondent.*] The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree had not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance; and the defendants objected to the decree, contending that such tree belonged to them. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter "against the defendants," within the meaning of s. 561 of the Civil Procedure Code, and, as the decree was limited to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal, and therefore the appellate Court was not warranted by law in entertaining the objection taken by the defendants.

Balak Tewari v. Kausil Misr 401

——— ——— ———*Time for filing objection—Holiday.*]—Where the time for filing objections under s. 561 of the Civil Procedure Code expired on a day when the Court was closed, and objections were filed on the day the Court re-opened, *held* that such objections were filed within time.

Baghelin v. Mathura Prasad 430

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ACTS——1877——X, s. 578—*Co-sharers, suit by some of several—Error in frame and valuation of suit—Error not affecting jurisdiction or merits.*]—The plaintiffs in this suit, alleging that they were co-sharers of a certain village; that certain land situate in such village was the property of the co-sharers; and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned, and valued the suit according to their share. *Held* that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of the case, was not, under s. 578 of the Civil Procedure Code, a ground on which the appellate Court should have reversed the decree of the Court of first instance *Unnoda Persad Roy* v. *Erskine* distinguished.

Param *v* Achal 289

——————s. 578. *See* ss. 45,578 163

——————s. 588 (6) *See* ss. 25,57,588 (6) 478

——————ss. 592, 622 *See* High Court's powers of revision— ... 91

——————s. 595 (*a*)—*Appeal to Her Majesty in Council—"Final decree."*] Certain persons interested in an award applied under s. 525 of the Civil Procedure Code to have it filed in Court. The Court made an order under s. 526 "that the claim of the plaintiffs be decreed." The defendants appealed to the High Court from this "decree" The High Court held that the appeal would not lie; and suggested to the plaintiffs to apply to the lower Court to give judgment according to the award, and a decree to follow it. Thereupon the plaintiffs made an application to the lower Court of the nature suggested, but styled it one for review of judgment. The lower Court granted the so-called review of judgment. The defendants appealed from the order of the lower Court, contending that the "review of judgment" had been improperly granted. On the 23rd June 1880 the High Court held that the order of the lower Court was not appealable, not being one passed on review of judgment, but on an application to give judgment and decree in accordance with an award which had been filed in Court. The defendants applied for leave to appeal to Her Majesty in Council from the order of the High Court of the 23rd June, 1880. *Held* that such order was not a "final decree" within the meaning of s 595 (*a*) of the Civil Procedure Code, and therefore it was not appealable to Her Majesty in Council.

Ramadhin Mahton *v* Ganesh 238

——————s. 622. *See* High Court's powers of revision ... 91,154

——————ss. 623, 624—*Review of judgment—To whom application may be made—Meaning of "made."*]—The term "made" in s. 624 of the Civil Procedure Code does not mean "presented," but means and includes the hearing and determination of the application for review of judgment.

Held, therefore, where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in s. 623 of the Civil Procedure Code, or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, that his successor was not competent to entertain it.

Pancham *v.* Jhinguri 278

——————ss. 642, 651—*Escape from custody under process of Revenue Court—Exemption from arrest.*] A Revenue Court is a "Court of Civil Judicature," within the meaning of s. 651 of the Code of Civil Procedure. A person, therefore, who escapes from custody under the process of a Revenue Court is punishable under that section.

S. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code."

Held, therefore, where a person, who had been convicted by a Magistrate and had been fined, was arrested in execution of the pro-

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cess of a Revenue Court while waiting in court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that, having escaped from custody under such arrest, such person had properly been convicted under s. 651 for escaping from "lawful custody."

Empress of India *v* Harakh Nath Singh 27

ACTS——1877——XV., s 4—*Suit against minor—Appointment of Guardian ad litem—Suit when instituted—Pre-emption—Minor—Estoppel*] A suit to enforce a right of pre-emption in respect of a share of an undivided village was instituted against the vendor and the purchaser, the latter being a minor, on the 1st June, 1880. The instrument of sale was registered on the 9th June, 1879. On the 14th June, 1880, the Court in which such suit was instituted made an order appointing a guardian for such suit for the minor purchaser. *Held*, having regard to the provisions of s. 4 of Act XV. of 1877, and *Ram Lal* v. *Harrison* and *Stuart Skinner* v. *William Orde* that, for the purposes of limitation, such suit was instituted, as regards the minor purchaser, on the 1st June, 1880, when the plaint was first presented, and not on the 14th June, 1880, when the order appointing a guardian for such suit for him was made, and such suit was therefore within time.

The vendees in a suit to enforce a right of pre-emption set up as a defence to the suit that the sale was invalid, on the ground that they were minors and therefore incompetent to contract. *Held* that, as they had paid their money to the vendor, and the conveyance had been perfected, and they were in possession of the property, they were estopped from urging such ground.

Khem Karan *v.* Har Dayal 37

——— ——— ———s. 8.—*Joint Hindu family—Debt due to family—Joint creditors.*] The manager of a joint Hindu family, of which *S* was a minor member, lent money on behalf of the family to *K*. The time limited by law for a suit for such money was three years from the date of the loan. During that period there were several members of the family who were *sui juris*. After attaining his age of majority *S* sued *K* for such money, and as the period limited by law for such suit had expired, relied on the saving provisions of s. 8 of the Limitation Act, 1877.

Held that, although during such period *S* was one of several joint creditors who was under a disability, yet as more than one member of the family could have given a discharge to *K* without *S's* concurrence, such provisions of s 8 of the Limitation Act were not applicable, and his suit was therefore barred by limitation.

Surju Prasad Singh *v.* Khwahish Ali 512

———————ss. 9, 13 —*Continuous running of time—Exclusion of time of defendant's absence from British India.*] S. 13 of the Limitation Act, 1877, is not in any way affected or qualified by s. 9 of the same Act.

In computing, therefore, the period of limitation prescribed for a suit, the time during which the defendant has been absent from British India should be excluded, notwithstanding that such period had begun to run before the defendant left British India. *Narronji Bhimji* v. *Mugnirum Chandaji* dissented from.

Beake and Co. *v.* Davis 530

——— ——— ———s. 10—*Trustee—Express trustee—Absent co-sharer—Limitation.*] S. 10 of the Limitation Act, 1877, has reference to express trustees, and in order to make a person an express trustee within the meaning of that section, it must appear either from express words or clearly from the facts that the rightful owner has intrusted the property to the person alleged to be a trustee for the discharge of a particular obligation.

In 1813 *S*, being unable to pay the Government revenue due on his land, abandoned his village. In 1833 *H*, who had paid the revenue due by *S*, and had taken, or obtained from the Government, possession of *S's* land, attested a village-paper in which it was stated that, if *S* returned and reimbursed him, he should be entitled to his land.

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Sixty years after *S* abandoned his village *B*, as the representative of *S*, sued the representative of *H* for such land, alleging that it had vested in *H* in trust to surrender it to *S* or his heirs on demand As evidence of such trust *B* relied on the village paper mentioned above, and on the village administration-paper of 1862, in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue due by them.

Held that such documents did not prove any express trust, within the meaning of s. 10 of the Limitation Act, 1877, and the suit was therefore barred by limitation.

Barkat *v.* Daulat 187

ACTS——1877——XV, s. 22. *See* Pre-emption 145

——— s. 23 and sch ii, No. 143—*Breach of contract—"Continuing breach"—Act IX. of* 1871 (*Limitation Act*), *s.* 23.] The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid such fees, and more than twelve years after the first default the vendors sued them for possession of such quantity of such land. *Held* that there had not been a "continuing breach of contract," within the meaning of s. 23 of Act XV. of 1877, and therefore the provisions of that section were not applicable to the suit; and further that the suit, being governed by No 143, sch. ii. of Act XV. of 1877, and more than twelve years having expired from the first breach of such agreement, was barred by limitation.

The difference between s. 23 of Act IX. of 1871 and Act XV. of 1877 pointed out.

Bhojraj *v.* Gulshan Ali 493

——— ——— sch. ii. No 10. *See* Pre-emption ... 24,179,218,291

——— ——— ———No 66. *See* Act III. of 1877, ss. 17,49 3

——— ——— ———Nos. 75, 179 (6)—*Execution of decree—Application for execution—Decree directing payment to be made at a certain date.*] *L* obtained a decree against *U*, dated the 24th September, 1867, for possession of a certain estate, subject to this provision, *viz.*, that if *U* paid in cash into the treasury of the Court, year by year, for *L*'s maintenance, so long as she might live, an allowance of Rs. 15 per mensem, in three instalments of Rs. 60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, *L* should be entitled to delivery of possession of such estate. The first default was made on the 18th January, 1874, but *L* waived the benefit of the provision. A fresh default was made, and on the 23rd January, 1880, *L* applied for possession of such estate. *Held* that the provisions of column 3, art 75, sch. ii of Act XV. of 1877, were not applicable to this case, but art. 179 (6) of that schedule contained the law which must govern it; and, the date upon which such decree became capable of execution for possession being the 18th January ,1874, the date of the first complete default, the application of the 23rd January, 1880, was barred by limitation.

Ugrah Nath *v.* Laganmani 83

——— ———Nos. 106, 120 *See* Partnership 437

——— - ——No 116—*Registered bond for the payment of money—Held*, following *Husain Ali Khan* v *Hafiz Ali Khan*, that a suit on a registered bond for the payment of money, which has not been paid on the due date, is a suit for compensation for the breach of a contract in writing registered, and therefore the limitation applicable to such a suit is that provided by No 116, sch. ii of the Limitation Act.

The principal on which the ruling that a suit on a bond which has not been paid on the due date is a suit for compensation explained by STUART, C.J., and *Nobocoomar Mukhopadhaya* v. *Sree Mullick* referred to.

Khunni *v.* Nasir-ud-din Ahmad 255

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ACTS——1877——XV, sch. ii, No. 120—*Suit against Municipal Committee—Claim for a declaration of right—Limitation—Act XV. of* 1873 (*N.-W. P. and Oudh Municipalities Act*), *s.* 43] The lessee of certain land belonging to the plaintiffs, situate within the limits of a Municipality, applied to the Municipal Committee for permission to establish a market on such land, and such permission was refused by the Committee on the 26th November, 1878. Meanwhile the plaintiffs, in behalf of the lessee and in their own behalf as proprietors of such land, applied to the Committee for such permission, sending such application by post. No orders were passed by the Committee on such application because it had come by post On the 18th April, 1879, the plaintiffs sued the Committee for a declaration of their right to establish a market on such land, and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing. The cause of action alleged was the refusal of the Committee of the 26th November, 1878.

Held by STUART, C. J., on the question whether such suit was barred by the provisions of s. 43 of Act XV. of 1873, not having been brought within three months next after the date of the alleged cause of action, that it was not so barred, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under that Act in which compensation was claimed, and not to those in which compensation was not claimed; and that therefore the present suit was not governed by the provisions of that section, but of No. 120, sch. ii. of Act XV. of 1877.

Also that the rejection of the lessee's application gave the plaintiffs a cause of action, as there was privity between them and the lessee; and that, as there was nothing in the Municipal rules prohibiting the presentation of an application by post, the application of the plaintiffs should not have been rejected.

Held by DUTHOIT, J., that the suit of the plaintiffs was governed by the provisions of s. 43 of Act XV. of 1873, and was therefore beyond time.

The Municipal Committee of Moradabad v. *Chatri Singh; Manni Kasaundhan* v. *Crooke;* and *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* referred to.

Brij Mohan Singh *v.* The Collector of Allahabad ... 102

——————No. 120—*Suit against Municipal Committee—Claim for a declaration of right—Limitation—Act XV. of* 1873 (*N.-W. P. and Oudh Municipalities Act*), *s.* 43.] A Municipal Committee refused the lessee of certain land permission to establish a market thereon, such lessee having applied for such permission on behalf of the owners of such land. Subsequently such Municipal Committee refused the owners of such land such permission on their applying themselves for it. Thereupon the owners of such land sued such Municipal Committee for a declaration of their right to establish such market, and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing.

Held by the Full Bench (reversing the decision of DUTHOIT, J., and affirming that of STUART, C. J.,) that such suit was not barred by limitation under the provisions of s. 43 of Act XV. of 1873, because it had not been brought within three months after the date of the alleged cause of action, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under the Act in which compensation was claimed, and not to those in which compensation was not claimed.

Held also by the Full Bench (confirming the decision of STUART, C. J.,) that the refusal of the Municipal Committee to allow the plaintiffs' lessee to establish the market gave them a cause of action.

Birj Mohan Singh *v.* The Collector of Allahabad ... 339

——————No. 120. *See* Pre-emption 218, 414

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ACTS——1877——XV, sch. ii, No. 178—*Application to amend decree—Act X. of* 1877 (*Civil Procedure Code*), *s* 206.] An application to amend a decree, which is found to be at variance with the judgment, in accordance with the provisions of s 206 of the Civil Procedure Code, is an application of the kind mentioned in No. 178 of sch. ii of Act XV. of 1877, and as such subject to the limitation of three years.

In the Matter of the Petition of Jaya Prasad *v.* Sikri Prasad, 23

——————No 179—*Execution of decree—Amendment of revenue record—Application for execution not "in accordance with law."*] The holders of a decree made by a Civil Court, which directed *inter alia* that they should be maintained in possession of a share of a village, by cancelment of the order of the settlement officer directing the entry of the judgment-debtor's name in the revenue registers in respect of such share, applied for execution of such decree, improperly asking the Court executing the decree to order the Collector to amend such entry by the substitution of their names for that of the judgment-debtor in respect of such share, instead of asking it to send such officer a copy of such decree for his information, with a view to such amendment. *Held* that such application, not being one in accordance with law, within the meaning of No. 179, sch. ii of Act XV. of 1877, was not one which would keep such decree in force.

Muhammad Umar *v.* Kamila Bibi 34

——————No. 179.—*Appeal by one of several defendants—Execution of decree—Application for execution against defendant who has not appealed—Limitation.*] On the 11th July, 1877, a decree was made against *B* and *J*, the defendants in a suit, against which *J* alone appealed, such appeal not proceeding on a ground common to him and *B*. The appellate Court affirmed such decree on the 20th November, 1877. On the 23rd September, 1880, the holder of such decree applied for execution against *B* *Held* that, so far as *B* was concerned, limitation should be computed from the date of such decree and not from the date of the decree of the appellate Court, and such application was therefore barred by limitation.

Sangram Singh *v.* Bujharat Singh 36

——————No 179.—*Execution of decree—Application by one of two joint decree holders for part execution of joint decree—Limitation—Act X. of* 1877 (*Civil Procedure Code*), *s.* 231.] A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder.

Held therefore, where one of two persons, in whose favour a decree for money had been passed jointly, applied on the 27th April, 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April, 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force.

Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole, preferred after the period of limitation had expired.

The Collector of Shâhjahânpur *v* Surjan Singh ... 72

——————No. 179—*Execution of decree—"Where there has been an appeal."*] The words "where there has been an appeal" in cl. 2, No 179 of sch. ii of Act XV. of 1877, do not contemplate and mean only an appeal from the decree of which execution is sought, but include, where there has been a review of the judgment on which such decree is based, and an appeal from the decree passed on such review, such appeal.

Held therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the appellate Court, application was made for execution of the original decree, that time began to run, not from the

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date of that decree, but from the date of the decree of the appellate Court. *Sheo Prasad* v. *Anrudh Singh* distinguished.
Narsingh Sewak Singh *v.* Madho Das 274

ACTS——1877—XV, sch. ii, No. 179 (6)—*Execution of decree—Application for execution—"Step in aid of execution."*] Application for execution of a decree was made on the 22nd November, 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertised for sale on the 27th March, 1876 On the latter date the parties to such decree made a joint application in writing to the Court, wherein it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months' time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January, 1879. The lower appellate Court held, with reference to the question whether such application had been made within the time limited by law, that it had been so made, as under No. 179 (6), sch. ii of Act XV. of 1877, such time began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 27th March, 1876. *Held* that No. 179 (6) had not any relevancy to the present case; but, inasmuch as the proceedings of the 27th March, 1876, might be considered as properly constituting a "step in aid of execution," within the meaning of No. 179 (4), the application of the 17th January, 1879, was within time.
Sitla Din *v.* Sheo Prasad 60

——————No. 179 (6).—*Decree payable by instalments—Execution of whole decree—Payments out of Court—Act X. of* 1877 (*Civil Procedure Code*), *s.* 258.] A decree payable by instalments provided that, in default in payment of two instalments, the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of the third and fourth instalments. The judgment-debtor objected that the application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that those instalments had been paid out of court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation, notwithstanding such payments had not been certified. *Fakir Chand Bhose* v. *Madan Mohun Ghose* followed.
Sham Lal *v* Kanahia Lal 316

——————1878—VII., ss. 54, 56, 58. *See* High Court's powers of revision... 417

——————1879—I. s. 68—*Court-fee stamps—Sale by unlicensed person—Act XVIII. of* 1869 (*General Stamp Act*), *s.* 48—*Act VII. of* 1870 (*Court-Fees Act*), *s.* 34.] The sale of Court-fee stamps without a license is not an offence.
Empress of India *v.* Jalla 216

——————XIII., s. 27. *See* High Court's appellate jurisdiction, 306

——————XVIII., ss. 10, 32—*Pleader—Mukhtar—Illegal Practising.*] A pleader or mukhtar practising in contravention of the provisions of s. 10 of Act XVIII. of 1879 is punishable under s. 32 of that Act only by the Court before which he has so practised.
In the Matter of the Petition of Ganga Dayal 375

——————1881—XII., ss. 2,9—*Landholder and tenant—Sale of occupancy-right in execution of decree—Act XVIII. of* 1873 (*N.-W. P. Rent Act*), *s.* 9.] *Held* that a landholder who had attached the occupancy right of an occupancy-tenant in certain land in execution of a decree before Act XII. of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of a landholder to bring such a right

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to sale in execution of a decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree.
Naik Ram Singh *v.* Murli Dhar 371

ACTS——1881—XII, ss. 14, 95 (*l*).—*Landholder and tenant—Partition—Sir land—Determination of rent of ex-proprietary tenant—Suit for damages for use and occupation of land—Act XIX of* 1873 (*N-W. P. Land-Revenue Act*), s. 125.] A co-sharer, in whose mahal, assigned on partition, sír land belonging to another co-sharer had been included, without having applied to the Revenue Court to have the rent of the latter in respect of such sír land determined, under s. 95 (*l*) of Act XII. of 1881, sued the latter in the Civil Court for damages for the use and occupation of such sír land, "without obtaining a lease or having the rent fixed" *Held*, following the principle laid down in S. A. No. 914 of 1879, that such suit was not maintainable.

Sir land of one sharer included on partition in the mahal assigned to another sharer is to be treated in the same way as sír land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of ex-proprietary tenancy comes by force of law into existence.

The words "may apply" in s. 14 of Act XII. of 1881 mean "shall apply," if the landholder wants to procure such a determination of his tenant's rent as would give him a title to sue his tenant under that Act for arrears of rent, and if he cannot get the rent arranged between himself and his tenant by other legitimate means, such as an amicable settlement between themselves or the like.
Ram Prasad Rai *v.* Dina Kuar 515
——————s. 93 (*g.*) *See* Jurisdiction 412
——————ss. 206, 207—*Suit instituted in Revenue Court partly cognizable in Civil Court.*] A co-sharer sued in a Court of Revenue (i) for his share of the profits of a mahal and (ii) for money payable to him for money paid for the defendants on account of Government revenue. An objection was taken in the Court of first instance that the suit, as regards the second claim, was not cognizable in a Court of Revenue. The lower appellate Court allowed the objection, and dismissed the suit as regards such claim, on the ground that the Court of first instance had no jurisdiction to try it. *Held* that, the objection being in effect "an objection that the suit was instituted in the wrong Court," within the meaning of ss. 206 and 207 of Act XII. of 1881, the defect of jurisdiction was cured by those sections, and the procedure prescribed in s. 207 should have been followed.
Lachmi Narain *v.* Bhawani Din 379

AGREEMENT TO HAVE CASE DECIDED ON THE EVIDENCE OF THIRD PERSON. *See* Arbitration 302
AGREEMENT TO REFER TO ARBITRATION. *See* Act I. of 1877, s. 21 546
ALIMONY PENDENTE LITE. *See* Act IV. of 1869, ss. 16, 36 ... 295
APPEAL. *See* Act X. of 1877, ss. 25, 57, 588(6) 478
——————ss. 108, 540 387
——————ss. 244(*c*), 281 190
——————s. 561 491
—— *See* Arbitration 283
—— *See* Act XVIII. of 1873, ss. 148, 183, 189 237
——BY LOCAL GOVERNMENT FROM JUDGMENT OF ACQUITTAL. *See* Act X. of 1872, s. 272 148
——BY ONE OF SEVERAL DEFENDANTS. *See* Act XV. of 1877, sch. ii., No. 179 36
——BY SOME ONLY AND NOT ALL OF THE DEFENDANTS. *See* Execution of decree 137
——TO HER MAJESTY IN COUNCIL. *See* Act X. of 1877, s. 595 (*a*) 238
APPELLATE COURT. *See* Act X. of 1872, s. 489 212

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ARBITRATION.—*Agreement to have case decided on the evidence of third person—Revocation of agreement—Act X. of* 1873 (*Oaths Act*), *ss.* 8-12—*Act X. of* 1877 (*Civil Procedure Code*), *Ch. XXXVII.*] The plaintiffs and some of the defendants in a suit agreed that the matters in difference between them in the suit should be decided in accordance with the statement made on oath by one *J* after he had made a local inquiry into such matters. The Court trying the suit accordingly directed that *J* should be examined on a certain day. Before *J* was examined the defendants objected to the case being decided in accordance with *J's* evidence, but the Court disallowed the objection, and having taken *J's* statement on oath decided the case in accordance therewith.

Held by STUART, C. J., that the provisions of ss. 8 to 12 of Act X. of 1873 were not applicable to the reference of the case to *J*; that such reference was in the nature of a reference to arbitration under the Code of Civil Procedure; that it would have been valid and binding on the parties had all the defendants joined in it; but that, as all the defendants did not do so, the proceedings were illegal, and they should be set aside and the suit be decided on the merits.

Held by OLDFIELD, J., that the reference of the case to *J* was not made under or governed by the provisions of the Civil Procedure Code relating to arbitration, and therefore the defendants were competent to revoke the agreement; and that, assuming the reference was made under the provisions of the Oaths Act, there was no rule of law prohibiting the revocation of such a reference, and therefore the defendants were competent to revoke the same.

Lekhraj Singh *v.* Dulhma Kuar 302

———*Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence—Judgment in accordance with award—Validity of award—Appeal—Act X. of* 1877 (*Civil Procedure Code*), *ss.* 520, 521, 522—*Act X. of* 1873 (*Oaths Act*). The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award.

Held by STRAIGHT, J., that such decree, being in accordance with the award, was not appealable.

Held by STUART, C. J., that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable.

Held by OLDFIELD, J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award, within the meaning of the Civil Procedure Code, the decree therefore was appealable.

Per STUART, C. J., that the procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.

Bhagirath *v.* Ram Ghulam 283

AWARD, EFFECT OF—ON TRANSFER. *See* Mortgage 462

BILL OF EXCHANGE *See* Act IX. of 1872, ss. 13, 20 834

BOND.—*Fraudulent alteration of hypothecation clause.*] The obligee of a bond for the payment of money, in which a certain share of a village had been hypothecated as collateral security, having fraudulently altered such bond so as to make it appear that a larger share of such village was hypothecated, sued the obligor to recover the money due

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on such bond by the sale of such larger share. The obligor admitted the execution of the bond and that a certain sum was due thereon. *Held*, on the question whether under these circumstances the obligee was entitled to relief as regards his claim for money, that he was not so entitled, inasmuch as the bond on which his suit was brought must be discarded, being a forgery, and therefore the suit as brought failed. S. A. No. 1037 of 1879, decided the 11th March, 1880, distinguished

Ganga Ram *v* Chandan Singh 62

BOND *Interest—Penalty—Equitable relief*] By a registered bond for Rs. 4,500, dated the 4th October, 1875, in which immoveable property was hypothecated as collateral security, it was provided that the obligor should pay interest at the rate of Re. 1-4-0 per cent. per mensem at the end of every six months, and upon default in the payment of such interest that he should pay interest at the rate of Rs. 2 per cent. per mensem from the date of the bond. The bond also contained a stipulation against alienation and declared that the principal sum was payable on demand. The obligees sued the obligor upon the bond, claiming to recover the principal sum, and interest from the date of the bond for three years eleven months and twenty days, less different sums amounting to Rs. 1,600 paid from time to time on account, at the defaulting rate of Rs. 2 per cent. *Held* that, having regard to the fact that the security of property was given for the loan, and the obligor contracted not to alienate the property, that the defaulting rate of interest provided by the bond was of a penal character, relating as it did not only to the interest due on and subsequent to the default, but retrospectively to the date of the bond itself, and should not be awarded, but that reasonable compensation only should be awarded for the obligor's breach of contract in respect of interest. Accordingly the Court made a decree giving the obligees interest on the principal sum, from the date of the bond to the date of the decree, at Re, 1 4-0 per cent. per mensem, and compound interest, from the date of default in the payment of interest to the date of the decree, at the rate of four annas per cent. per mensem, by way of damages for such default.

Bansidhar v. *Bu Ali Khan* followed: *Mackintosh* v. *Wingrove* dissented from.

Kharag Singh *v.* Bhola Nath 8

——— *See* Act IX. of 1872, ss. 2 (*d*), 15, 19, 25, ... 352

——— *See* Act X. of 1877, s. 13 55

——— *See* Act III. of 1877, ss. 58-60 206

——— *See* Contract 330

BUILDING APPURTENANT TO ZAMINDARI RIGHTS. *See* Execution of decree, ... 381

BURDEN OF PROOF. *See* Act III .of 1877, ss. 58-60, 87 206

CAUSE OF ACTION. *See* Jurisdiction 423

——— *See* Act XXVII. of 1860, s. 4 355

CERTIFICATE FOR COLLECTION OF DEBTS. *See* Act XXVII. of 1860 ... ... 355, 485

COERCION. *See* Act IX. of 1872, ss. 2 (*d*) 15, 19, 25 352

COMPROMISE. *See* Execution of decree... 240

CONDITION AGAINST ALIENATION. *See* Mortgage 518

CONDITIONAL DECREE. *See* Pre-emption 420

CONDITIONAL SALE. *See* Pre-emption 218, 291

CONFESSION. *See* Act I of 1872 ... ... 46, 198

CONSEQUENTIAL RELIEF *See* Jurisdiction 320

CONSIDERATION. *See* Act IX. of 1872, ss. 2 (*d*), 15, 19, 25 352

CONTINUING BREACH. *See* Act XV. of 1877, s. 23 and sch. ii, No. 143, 493

CONTRACT. *See* Jurisdiction 423

——— *See* Execution of decree 240

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CONTRACT, SUBSTITUTION OF NEW—*Accounts stated—Bond given for balance—Bond impounded as insufficiently stamped—Suit on accounts stated.*] Where accounts between a creditor and his debtor were stated, and the latter gave the former a bond for the balance found due by him to the creditor, *held* that the creditor was precluded from subsequently suing on the accounts stated for the balance which had been found due.

Sirdar Kuar *v.* Chandrawati 330

———OF SALE—*Vendor and purchaser—Purchase money.*] The vendees of certain land, a portion of which only was in their possession by virtue of the sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land, and to have a sale of a portion of such land, made after it had been sold to them, set aside *Held* that, inasmuch as the sale to them had taken effect, they were entitled, notwithstanding the whole of the purchase-money might not have been paid, to a decree as claimed, and the vendors, if they had any claim in respect of the purchase-money, should be left to seek their remedy.

Kesri *v.* Ganga Prasad 168

CONTRIBUTION. *See* Mortgage 58

CONVERT. *See* Act VI of 1871, s. 24 343

CO-RESPONDENT. *See* Act IV. of 1869, ss. 51, 52 49

COSTS. *See* Execution of decree 376

———*See* Will, construction of 500

COURT FEES. *See* Jurisdiction 023

———*See* Act I. of 1879 216

COVENANT FOR GOOD TITLE. *See* Vendor and Purchaser ... 357

CRUELTY. *See* Judicial Separation 374

DAUGHTER'S RIGHT OF SUCCESSION TO FATHER'S ESTATE. *See* Hindu Law 243

DEBT. *See* Act I. of 1872, s 91 135

———*See* Muhammadan Law 361

DECLARATORY DECREE. *See* Hindu Law 16

———*See* Jurisdiction 320

DECREE NISI FOR DISSOLUTION OF MARRIAGE. *See* Act IV. of 1869, ss. 16, 36 295

———PAYABLE BY INSTALMENTS. *See* Act XV. of 1877, sch. ii. No. 179 (6) 316

DISCHARGE OF ACCUSED. *See* Act X. of 1872, ss. 196, 197, Expl. ... 150

DOWER. *See* Muhammadan Law 205

EJECTMENT. *See* Landholder and Tenant 174

EQUITABLE RELIEF. *See* Bond 8

ERROR NOT AFFECTING JURISDICTION OR MERITS. *See* Act X of 1877, ss. 45, 578, and s. 578 . ... 163, 289

ESCAPE FROM CUSTODY UNDER PROCESS OF REVENUE COURT. *See* Act X. of 1877, ss. 642, 651 27

ESTOPPEL. *See* Act XV. of 1877, s. 4 87

EUROPEAN BRITISH SUBJECT. *See* Jurisdiction 141

EVIDENCE.—*Examination of witnesses—Mode of taking evidence.*] Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case.

Phul Kuar *v.* Surjan Pandey 249

EVIDENCE.—*Proof of document—Secondary evidence.*] The proprietary right in a taluka was sold with the reservation of part of the land belonging to it, subject to the agreement that the vendor should be indemnified by the vendee in respect of the revenue required to be paid on the reserved part. Afterwards assignments on both sides took place, and the plaintiff, claiming through the vendor, sued the defendants, who derived title from the vendee, to enforce this liability. The plaintiff alleged, but did not produce, an *ikrar-nama* admitting this agreement

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between the original parties to the sale. The only proof adduced was a judgment in a suit in which this agreement had been held established. The plaintiff's case failed, as it had not been adjudged that the right to this indemnity related to a future revenue settlement, nor had it been decided that the agreement was to run with the land so as to bind others, under whatever title they might be in possession.

In the suit in which that judgment was given, the *ikrar-nama* not having been produced, the Court of first instance would not admit secondary evidence of its contents. On appeal, inspection of the document having been offered to, and declined by the appellate Court, secondary evidence was admitted.

On this appeal, the error was pointed out of allowing the plaintiff to give secondary evidence of the contents of a document, the original of which was in his custody, without the Court's looking at the document.

Hira Lal *v* Ganesh Prasad 406

EVIDENCE. *See* High Court's appellate jurisdiction 306

EXECUTION OF DECREE —*Appeal by some only and not all of the defendants Amendment of decree—Review of judgment—Act IX of* 1871, (*Limitation Act*) *sch. ii., No* 167.] On the 7th July, 1864, a District Court gave the plaintiff in a suit a decree against all the defendants including *B*. All the defendants appealed to the Sudder Court from such decree except *B* The Sudder Court on the 6th March, 1865, set aside such decree and dismissed the suit. The plaintiff appealed to Her Majesty in Council from the Sudder Court's decree, all the defendants except *B* being respondents to this appeal. Her Majesty in Council, on the 17th March, 1869, made a decree reversing the Sudder Court's decree and restoring that of the District Court. On the 9th October, 1869, the plaintiff applied for execution of the District Court's decree, and such decree was under execution up to July 1872 On the 9th October, 1874, the plaintiff applied for amendment of such decree in certain respects, it being incapable of execution in those respects *B* was a party to this proceeding. On the 16th August, 1876, such decree was amended; and the plaintiff subsequently applied for its execution as amended against all the defendants. *Held* that notwithstanding *B* was not a party to the appeals to the Sudder Court and Her Majesty in Council, such decree was a valid decree and capable of execution against him. Also that the application of the 9th October, 1869, was within time, computing from the date of the decree of Her Majesty in Council—*Chedoo Lal* v. *Nand Coomar Lal*. Also that the application to amend such decree, being substantially one for review of judgment, gave under art. 167, sch. ii. of Act IX. of 1871, a period from which limitation would run in respect of the subsequent application for execution which was therefore within time.

Kishen Sahai *v.* The Collector of Allahabad 137

——— *Attachment of property in execution of decree of two Courts—Postponement of sale by Court of higher grade—Sale of property under order of Court of lower grade—Invalidity of sale—Act X. of* 1877 (*Civil Procedure Code*), *ss* 285, 311] When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the Court of the highest grade, where such Courts are of different grades, or the Court which first effectuated the attachment, where such Courts are of the same grade, is, under s. 285 of the Civil Procedure Code, the Court which has the power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds, and of providing for their distribution under s 295.

Held, therefore, where the immoveable property of a judgment-debtor was attached in execution of several decrees, one a Munsif's decree, and the rest a Subordinate Judge's decrees, and the Subordinate Judge postponed the sale of such property, but the Munsif refused to do so, and such property was sold in execution of the Munsif's decree, that the sale was void as having been made in

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pursuance of the order of a Court which had no jurisdiction to direct it.

In the Matter of the Petition of Badri Prasad 350

EXECUTION OF DECREE—*Compromise—Contract superseding decree*] A judgment-debtor, against whom a decree for money was in course of execution, presented a petition to the Court executing the decree in which it was stated that a part of the money payable under the decree had been paid; that it had been agreed that a part of the balance should be set-off against a debt due to the judgment-debtor to be realized by the decree-holder, and the remainder should be paid by the judgment-debtor by certain instalments, and that if default were made in payment of any one instalment, the decree-holder should be at liberty to execute the decree for the whole amount, and the judgment debtor asked the Court to sanction the arrangement The decree holder expressed his assent to the arrangement, and the Court recorded a proceeding reciting the arrangement, and releasing from attachment property of the judgment debtor which had been attached Default having been made, the decree-holder applied for execution of the decree *Held* that the petition of the judgment-debtor set out above did not amount to nor was it any evidence of a new contract superseding the decree, and the decree might be executed. *Debi Rai* v. *Gokul Prasad* distinguished

Ganga v. Murli Dhar 240

———*Decree for sale of immoveable property—Purchase of property by decree holder's brother—Execution of decree against judgment debtor's person—Equity, justice and good conscience*] If, the holder of a decree for money, which ordered the sale of certain immoveable property in satisfaction of its amount, applied for execution of the decree, praying for the arrest of the judgment debtor *W's* brother had previously purchased such property at a sale in execution of another decree against the judgment debtor, paying a small amount for it, in consequence of the existence of his brother's decree

Held that, under these circumstances, applying equity, the decree should in the first place be executed against such property, and not against the person of the judgment-debtor

Wali Muhammad v Turab Ali 497

———*Sale of "ancestral" land by order of the Court—Act X of 1877 (Civil Procedure Code), ss 311, 320—Rules prescribed by Local Government under s 320—Invalidity of sale*] A Subordinate Judge made an order for the sale in execution of a decree of certain immoveable property, which was "ancestral," within the meaning of the Notification by the Local Government No 671, dated the 30th August, 1880, under which execution of such decree should have been transferred to the Collector; and such property was sold accordingly *Held* that, the order for the sale of such property having been made without jurisdiction, the sale was void and should be set aside.

Sukhdeo Rai v Sheo Ghulam 382

———*Sale of zamindari rights—Building appurtenant to zamindari rights*] The "rights and interests" of a zamindar in a certain village were sold in execution of a decree At the time of the sale a certain building was his property *quâ* zamindar *Held* that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interests" in the village passed such building to the auction purchaser. S. A No 245 of 1876 followed.

Abu Hasan v. Ramzan Ali 381

———*The decree to be executed, where there has been an appeal—Costs.*] *Held* that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing such decree

Shohrat Singh v. Bridgman 376

———*See* Act X, of 1877.

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EXECUTION OF DECREE. *See* Act XV. of 1877.
——— *See* Religious endowment 81
EX-PARTE DECREE. *See* Act X. of 1877, ss. 108, 540 387
EXPRESS TRUSTEE *See* Act XV. of 1877, s. 10 187
FALSE CHARGE. *See* Act XLV. of 1860, s. 211 182
FALSE EVIDENCE. *See* Act XLV. of 1860 ss. 193, 196 293
FALSE INFORMATION. *See* Act XLV. of 1860, s. 182 498
FINAL DECREE. *See* Act X. of 1877, s. 595 (*a*) 238
FORECLOSURE. *See* Mortgage 332
FOREST OFFENCE. *See* High Court's powers of revision 417
FRAUD. *See* Mortgage 462
——— *See* Bond 62

FRESH SUIT—*Delivery of possession in execution of decree—Subsequent continuance in possession of judgment-debtor—Right to fresh execution of decree.*] When formal possession of immoveable property has been delivered according to law to a person holding a decree for the delivery of the same, the subsequent continuance in actual possession of the judgment-debtor does not give the decree-holder a right to a fresh order for delivery of possession in execution of the decree, but gives him a right to institute a fresh suit for possession of such property.

Gopal Das *v* Than Singh 184
——— *See* Act VIII. of 1859 131
——— *See* Mortgage 481
GIFT. *See* Act VIII. of 1871, ss. 58, 85 40
——— *See* Hindu Law. 482

HIGH COURT'S CHARTER, s. 12—*Lunatic—Native of India—Act XXXV. of* 1858, *s.* 23—*Original jurisdiction of High Court in respect of the persons and estates of lunatics who are natives of India.*] The High Court has not, under s. 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India.

In the Matter of the Petition of Jaundha Kuar 159
——— POWERS OF REVISION—*Forest-offence Confiscation—Act VII. of* 1878 (*Forests Act*), *ss.* 54, 56, 58.] No order confiscating forest-produce which is the property of Government in respect of which a forest offence has been committed is necessary or can be made. All that need be done is to direct a forest-officer to take charge of such forest-produce.

An order directing the confiscation of forest-produce not belonging to Government, in respect of which a forest-offence has been committed, can only be made at the time the offender is convicted.

The High Court is competent under s 297 of Act X of 1872 to revise an order made by a District Judge under s 58 of the Forests Act, 1878 on appeal from the order of a Magistrate made under s 54 of that Act, the jurisdiction of the High Court under s 297 of Act X of 1872 not being expressly taken away by s. 58 of the Forests Act, 1878.

Empress of India *v.* Nathu Khan 417
——— ——— *Act X. of* 1877, *ss.* 592, 622.—*Rejection of application to appeal as a pauper.*] An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader and was on that ground rejected. *Held*, on an application to the High Court for revision, that s. 622 of Act X. of 1877 did not apply to a proceeding of so purely an interlocutory a character as mentioned in s. 592, and such application therefore could not be entertained.

Harsaran Singh *v.* Muhammad Raza 91
——— ——— ——— *Act X. of* 1877 (*Civil Procedure Code*), *s.* 622—*Delay in moving Court.*] Where an auction purchaser applied to the High Court to set aside, in the exercise of its powers under s. 622 of the Civil Procedure Code, an order setting aside a sale of immoveable property in execution of a decree, on

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the ground that such order was illegal, such application being made nearly seventeen months after the date of such order, the Court, having regard to the time that had elapsed before such application was made, refused to interfere.

In the Matter of the Petition of Durga Prasad 154

HIGH COURT'S APPELLATE JURISDICTION.—*Judicial Commissioner of Oudh—Act IV of* 1869 (*Divorce Act*), *ss* 3 (2), 55—*Act XIII. of* 1879 (*Oudh Civil Courts' Act*), *s.* 27—*Production of additional evidence in Appellate Court*] A decree dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII. of 1879, and the Divorce Act, 1869, is appealable to the High Court for the North-Western Provinces.

At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage, on the ground of her husband's incestuous adultery with her sister *M* and cruelty, the appellant produced certain letters written by the respondent and *M* to each other which showed that a criminal intimacy existed between them. These letters were not written until after the appellant had filed the appeal. *Held* that such letters were admissible and should be admitted, and that, having been brought to the Court's notice by the appellant's counsel, the Court was bound in the interests of justice to require their production in order to enable it to decide the appeal on its real merits.

Morgan *v.* Morgan 306

———ORIGINAL JURISDICTION. *See* High Court's Charter ... 159

HINDU LAW—*Hindu widow—Maintenance—Charge on her husband's estate—Bonâ fide purchaser for value without notice.*] The maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate which can be enforced against a *bonâ fide* purchaser of such estate for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate, a portion of such estate will be liable to such charge in the hands of a purchaser, even if it be shown that the heirs to such estate have retained enough of it to meet such charge; but such estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu Law, and which under that law takes precedence of a claim of maintenance

Sham Lal *v.* Banna 296

———*Joint Hindu family—Debts contracted by father as manager of family business—Sale of ancestral property in execution of decree against father—Son's share.*] *N*, a member of a joint Hindu family, consisting of himself, his wife, and his minor son, *L*, managed the joint family business, which was carried on under the style of "Atma Ram Anokhe Lal." As manager of such business he contracted certain debts, for which he was sued as the "proprietor" of the firm of "Atma Ram Anokhe Lal," and for which decrees were passed against him, in execution of which ancestral property of the family was sold. *L*, his minor son, sued to have such sale set aside, and to recover his share of such property, on the ground that such decrees had been passed against his father personally, and only his interests in such property passed by such sale. *Held* that, looking at the capacity in which *N* was sued, and the nature of the debts for which such decrees were given, such decrees must be taken to have been passed against *N* as the managing head of the family, and *L* was therefore not entitled to recover his share of such property.

Phul Chand *v.* Lachmi Chand 486

———*Mitakshara—Hindu widow—Alienation—"Legal Necessity"—Litigation—Reversioner*] *R*, a Hindu widow, who had succeeded to the estate of her deceased husband, mortgaged a portion of it to *L*, as security for the repayment of money which she borrowed from him for the purpose of suing for an estate to which her deceased hus-

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band had an alleged right of succession, which he had not however himself sought to enforce. This suit was dismissed. *R* subsequently transferred her deceased husband's estate to his daughter *I*. *L* sued *R* and *I* to enforce the mortgage made to him by *R*, by cancelment of such transfer.

Held that the mere fact that the mortgaged property had been transferred to *I* did not preclude her from contending, as next reversioner, that the mortgage of such property by *R* was void for want of "legal necessity."

That, under the circumstances stated above, there was not any "legal necessity," within the meaning of the Hindu Law, for such mortgage, and such suit not having been for the benefit of the estate of *R's* deceased husband, that consequently such mortgage was not valid so far as the reversionary right of *I* was concerned.

That, however, *I's* right to the mortgaged property as transferee from *R* was subject to such mortgage.

The nature of a Hindu widow's estate in her deceased husband's immoveable property, her power of alienation generally, and her power of alienation in particular for the purposes of litigation, discussed.

Hunoomanpersaud Panday v. *Babooee Munraj Koonweree; The Collector of Masulipatam* v. *C. V. Narrainopah; Grose* v. *Amirtamayi Dasi; Phool Koer* v. *Dabee Pershad; Roy Mukhun Lall* v. *Stewart; Nugenderchunder Ghose* v. *Sreemutty Kamine Dossee;* and *Barjun Doobey* v. *Brij Bhookun Lall Awusti* referred to.

Indar Kuar *v* Lalta Prasad Singh 532

HINDU LAW.—*Mitakshara—Partition—Right of son born after partition to father's property.*] The property acquired by a Hindu governed by the law of the Mitakshara after a partition has taken place between him and his sons devolves on his death, when he leaves a son born after partition, on such son, to the exclusion of the other sons.

Nawal Singh *v.* Bhagwan Singh 427

——— *Mitakshara, ch.* i, *s.* iii. *v.* 11, *and ch.* ii., *s.* xi, *v.* 13—*Daughter's right of succession to father's estate—Meaning of "unprovided" for.*]—The estate of a deceased Hindu, governed by the law of the Mitakshara, was in the possession of one of his daughters, who was in poor circumstances. His other daughter, who was well off and possessed of property, claimed to share in such estate, contending, with reference to the law of the Mitakshara, that, as no provision had been made for her by her father, she was "unprovided" for, within the meaning of that law, and therefore entitled to share in such estate. *Held* that such expression must be construed irrespective of the sources of provision or non-provision.

Dannu *v.* Darbo 243

——— *Widow's power of alienation—Gift for pious and religious purposes.*] An alienation by a Hindu widow of her deceased husband's estate for pious and religious purposes, made for her own spiritual welfare, and not for that of her deceased husband, is not valid.

The power of a Hindu widow to alienate her deceased husband's estate for pious and religious purposes defined. *The Collector of Masulipatam* v. *C. V. Narrainapah* referred to.

Puran Dai *v.* Jai Narain 482

——— *Widow——Alienation——Reversioner—Declaratory decree.*] Where a Hindu widow in possession as such of her deceased husband's property alienates it, only the person presumptively entitled to possess the property on her death may sue for a declaration of his right as against such alienation, unless such person has precluded himself from so suing by collusion and connivance, when the person entitled next to him may so sue.

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Raghu Nath *v.* Thakuri 16

HINDU LAW.—*Mitakshara law—Inheritance of share in village—Interest of son acquired on birth.*] A mauza, of which the proprietary right formerly belonged to one zamindar, the ancestor of the plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government by purchase. The Government, before the birth of the plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the plaintiff's father, who thus obtained possession of a five biswas share. *Held* that, whatever interest the plaintiff, as son, might have under the Mitakshara law, in ancestral property, it could not be said that, at the time of his birth, there was any proportionate share in the mauza in which he could by birth, acquire an interest, except this five biswas share.

In this suit the plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five biswas share only. *Held* that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest.

Ujagar Singh *v.* Pitam Singh 120

———*Suit by son to set aside Father's alienation of ancestral property—Death of son—Abatement of suit—Hindu mother.*] Where a Hindu minor, governed by the law of the Mitakshara, on whose behalf a suit to set aside his father's alienation of ancestral property had been instituted, died, *held* that no right to sue survived in favour of his mother, but the suit abated.

Padarath Singh *v* Raja Ram, and after his death Akauti Kuar 235

———*Joint Hindu family—Adult Son—Mortgage of family property by father—Decree against father—Right of Son.*] The father in a joint undivided Hindu family governed by the law of the Mitakshara mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objection having been disallowed, he sued the mortgagee for a declaration that such share was not liable to be sold in execution of the decree, claiming on the ground that he was not bound by the mortgage or the decree, not having joined in the mortgage or been a party to the suit in which the decree was made, and that the debt secured by the mortgage had been incurred by his father for immoral purposes.

Held that the son was not entitled to succeed in such suit merely because, although he was of age, he was not required by the mortgagee to join in the mortgage, and was not made a party to the suit to enforce the mortgage; but that he was in the same position as he would have been had he been a minor at the time the mortgage was made and the decree was passed, and was therefore only entitled to succeed if he showed that the debt incurred by his father was incurred for immoral purposes of his own.

Held further that, inasmuch as the debt in question was incurred for necessary purposes, and as the son was aware of the mortgage and did not protest against it, but on the contrary stood by and benefited thereby, and as he was aware of the suit and did not apply to be made a party thereto, he was asking too late for the relief which he sought. *Ram Narain Lal* v. *Bhawani Prasad* referred to.

Phul Chand *v.* Mán Singh... 309

HOLIDAY. *See* Act X of 1877, s. 561... 430

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HUSBAND AND WIFE. *See* Judicial separation 374
——— ——— *See* Muhammadan Law 205
INCIDENTAL DECISION OF ISSUE. *See* Act X. of 1877, s. 561 ... 491
INHERITANCE *See* Hindu Law 120
INSOLVENT JUDGMENT-DEBTOR. *See* Act X of 1877 s. 351 ... 337
INSTITUTION OF SUIT IN WRONG COURT. *See* Act X. of 1877, ss 25. 57. 588 (6) 478
INTEREST. *See* Bond 8
———. *See* Act X. of 1877, s 13 55
INTESTATE. *See* Act X of 1865, ss. 190. 191 193
IRREGULARITY NOT AFFECTING MERITS OR JURISDICTION. *See* Act X. of 1877 ss 45, 578, and s. 578 ... ...163, 239
JOINDER OF CHARGES. *See* Act X of 1872, ss. 452, 453 147
JOINT HINDU FAMILY. *See* Hindu Law
——— ——— ——— . *See* Act XV. of 1877, s. 8 512
JUDICIAL COMMISSIONER OF OUDH. *See* High Court's appellate jurisdiction 306
JUDICIAL SEPARATION.—*Husband and wife—Charges against wife of adultery—Cruelty*] A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and without reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation
Augustin *v* Augustin 374
JURISDICTION.—*Act XII. of* 1881 (*N.-W. P. Rent Act*), *s* 93 (*g*)—*Suit for arrears of revenue.*] *Held* that a suit against a co-sharer and the transferees of his share for arrears of Government revenue which became due before such transfer, the plaintiff claiming as lambardar and as heir to the deceased lambardar during whose incumbency such arrears became due, was cognizable in the Revenue Courts. The principle laid down in *Phikhan Khan* v. *Ratan Kuar* followed.
Wazir Muhammad Khan *v* Gauri Dat 412
——— ——— ———*European British subject—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 74, 83] *B*, who was charged before a Magistrate, who was competent to inquire into a complaint against a European British subject, with an offence triable by him, claimed to be dealt with as a European British subject. *B* did not state the grounds of such claim The Magistrate did not decide whether *B* was or was not a European British subject, but proceeded with the case, dealing with him as if he were not a European British subject, and sentencing him to rigorous imprisonment for one year and to a fine. On appeal by *B* the High Court remanded the case to the Magistrate in order that he might decide, in the manner directed by s 83 of the Criminal Procedure Code, whether *B* was or was not a European British subject
The Magistrate having decided that *B* was a European British subject, *held* that, this being so, and it appearing that the Magistrate had dealt with *B* as other than a European British subject, *B's* trial was void for want of jurisdiction Also that the Magistrate having tried the case without jurisdiction, the High Court could not proceed with *B's* appeal on the merits, with a view in the event of its deciding that the offence of which *B* was charged had been established to the reduction of the sentence passed upon him by the Magistrate to one which he was competent to pass under s. 74 of the Criminal Procedure Code.
Empress of India *v* Berrill 141
——— ——— ———*Contract for sale and delivery of goods at fixed price—Suit for price—Cause of action—Place of suing—Act X of* 1877 (*Civil Procedure Code*), *s* 17 (*a*)]. *C* and *L* entered into an agreement at a place in the Saran district, in which the latter resided and carried on business, whereby *C* promised to sell and deliver to *L* at a place in the Saran district certain goods, and *L* promised to pay for such goods on delivery "by approved draft on Calcutta or Cawnpore

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(where *C* carried on business) payable thirty days after the receipt of the goods or by Government currency notes" *C* delivered the goods according to his promise, but *L* did not pay for the same, and *C* therefore sued *L* for the price of the goods, suing him at Cawnpore.

Held that the "cause of action," within the meaning of s 17 of the Civil Procedure Code, was *L's* breach of his promise to pay for the goods; that the parties intended that payment should be made at Cawnpore and the cause of action therefore arose there; and that therefore the suit had been properly instituted there.

Llewhellin *v* Chunni Lal 423

JURISDICTION.—*Suit to have a lease set aside and buildings erected by lessees demolished Suit for possession of land and demolition of buildings erected thereon—Court fees Valuation of suit for the purposes of the Court-Fees' Act, 1870 —Declaratory decree—Consequential relief—Act VII of 1870 (Court-Fees' Act), s. 7, art iv, cl iv —Act VI of 1871 (Bengal Civil Courts Act) ss 20 22]* Certain co sharers of a village sued to have a lease of certain land, the joint and undivided property of the co sharers, which the other co-sharers had granted, set aside, and to have the buildings erected on such land by the lessees demolished, on the ground that such lease had been granted without their consent, without which it could not lawfully be granted They valued the relief sought at Rs 100. The value of the buildings of which they sought demolition was Rs. 3,000.

B sued *N* claiming, *inter alia*, possession of certain land, and to have certain buildings erected thereon by the defendant demolished.

Held with reference to the abovementioned suits, that in estimating their value for the purposes of the Court-Fees' Act 1870, or of the Bengal Civil Courts' Act, 1871, the value of the buildings which might have to be demolished should not be taken into account

Held by STRAIGHT, BIDDULPH and TYRRELL, JJ., with reference to the first suit, that it was one for a declaratory decree in which consequential relief was praved, and fell under s 7, art. iv, cl iv, Court-Fees' Act. 1870, and such relief being valued at Rs 100, had been properly instituted in the Munsif's Court.

Jogal Kishor *v* Tale Singh 320
Bindeshri Chaubey *v* Nandu 320
——— *See* Act X. of 1877, ss 25, 57 ,588 (6) 478
——— *See* Res judicata 11
——— OF REVENUE COURT *See* Mortgage ... 430
JUSTICE, EQUITY AND GOOD CONSCIENCE. *See* Act VI. of 1871, s. 24 343
——— *See* Execution of decree 497
LACHES. *See* Act IX. of 1872. ss 13, 20 334
LANDHOLDER AND TENANT.—*Planting trees—Ejectment*] A tenant planted trees on one of the plots of land comprising his holding, an act which rendered him liable to ejectment He paid rent not in respect of each plot of land, but in respect of the entire holding. *Held* that he was liable to ejectment, not merely from the plot on which he had planted the trees, but from his entire holding.

Bholai *v* The Rajah of Bansi 174
———. *See* Act VIII of 1873.
——— Act XII. of 1881.
LEASE. *See* Act X. of 1877, s. 43 ... ...180, 318
——— *See* Mortgage 430
LEGAL NECESSITY *See* Hindu Law 532
LETTERS OF ADMINISTRATION. *See* Act X. of 1865, ss. 190, 191 ... 192
LIMITATION. *See* Act XV. of 1877.
——— ———. *See* Pre-emption
MAGISTRATE OF THE DISTRICT. *See* Act X of 1872, s 489 ... 212
———. *See* Act X. of 1872, ss 41, 44, 46 ... 366

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MAGISTRATE OF THE THIRD CLASS. *See* Act X. of 1872, ss. 41, 44, 46 366
MAINTENANCE. *See* Hindu Law 296
MINOR. *See* Act XL. of 1858.
MISJOINDER. *See* Act X. of 1877
MISSTATEMENT IN PETITION FOR SPECIAL LEAVE TO APPEAL. *See* Will, construction of 500
MISTAKE. *See* Act IX of 1872 ss. 13, 20 334
MITAKSHARA. *See* Hindu Law.
MONEY HAD AND RECEIVED FOR PLAINTIFF'S USE. *See* Usufructuary mortgage 281
MONEY LENT. *See* Mortgage 281

MORTGAGE.—*Condition against alienation—First and second mortgagees—Purchase by mortgagee of mortgaged property.*] A transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and, with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee. *Chunni* v. *Thakur Das; Mul Chand* v. *Balgobind;* and *Lachmin Narain* v. *Koteshar Nath* observed on.

A mortgage is not extinguished by the purchase of the mortgaged property by the mortgagee, but subsists after the purchase, when it is the manifest intention of the mortgagee to keep the mortgage alive, or it is for his benefit to do so. *Gaya Prasad* v. *Salik Prasad* and *Ramu Naikan* v. *Subbaraya Mudali* followed.

It is not absolutely necessary for the first mortgagee of property, when suing to enforce his mortgage, to make the second mortgagee a party to the suit. If the second mortgagee is not made a party to the suit, he is not bound by the decree which the first mortgagee may obtain for the sale of the property, but can redeem the property before it is sold; but if he does not redeem, and the property is sold in execution of the decree, his mortgage will be defeated, unless he can show some fraud or collusion which would entitle him to defeat the first mortgage or to have it postponed to his own. The ruling of TURNER, J., in *Khub Chand* v. *Kalian Das* followed.

In July, 1874, a usufructuary mortgage of certain immoveable property was made to *D*. In July, 1875, a portion of such property was again mortgaged to *D*. The instrument of mortgage on this occasion contained a condition against alienation In July, 1877, the whole property was mortgaged to *N*. In October, 1877, it was again mortgaged to *D*. *N* sued the mortgagor on his mortgage in July, 1877, and on the 29th September, 1879, obtained a decree against him for the sale of the property. In October, 1879, the mortgagor sold the property to *D* in satisfaction of his mortgages of July, 1875, and October, 1877. *D* did not offer to redeem *N's* mortgage, and on the 20th November, 1880. the property was put up for sale in execution of *N's* decree, (*D's* objection to the sale having been previously disallowed), and was purchased by *A*. *D*, who was still in possession under his mortgage of July, 1874, then sued *A* for a declaration of his proprietary right to the property, claiming by virtue of his mortgages and the sale of October, 1879.

Held, applying the rules stated above, that *N's* mortgage of July, 1877, could not affect *D's* right under his mortgage of July, 1875, but *N* took subject to such mortgage; nor could the auction sale of the 20th November, 1880, which took place in enforcement of *N's* mortgage, affect *D's* prior mortgages; and therefore the condition against alienation made in *D's* favour had no prejudicial effect on the right of *A* under his auction-purchase.

That the purchase by *D* of October, 1879, did not extinguish his prior mortgages, but such mortgages were still subsisting, and *A* purchased subject to them.

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That, there having been no fraud or collusion on *N's* part, *A* must be held to have purchased subject only to *D's* prior mortgages and not subject to *D's* mortgage of October, 1877.

Held also that, as *D's* purchase of October, 1879, was made without *N* having had an opportunity of redeeming *D's* prior mortgages, *D's* purchase was subject to *N's* mortage of July, 1877, and therefore could not deprive *A* of what he had purchased at the auction-sale of the 20th November, 1880.

Held, therefore, that all the relief that *D* was entitled to was a declaration that, as prior mortgagee under the mortgages of July, 1874, and July, 1875, he was entitled, as against *A*, to retain possession of the property, until such mortgages were satisfied.

Ali Hasan *v.* Dhirja 518

MORTGAGE——*First and second mortgagees—Purchase of mortgaged property by first mortgagee.*] The first mortgagee of certain property purchased it at an execution-sale. The second mortgagee of such property subsequently sued the mortgagor and the first mortgagee to enforce his mortgage, by the sale of such property. *Held* that the first mortgagee was entitled to resist such sale, by virtue of being the first mortgagee, until his mortgage-debt was satisfied, and the fact that he had purchased the property mortgaged to him did not extinguish his mortgage, which must be held to subsist for his benefit. *Gaya Prasad* v. *Salik Prasad* followed.

Har Prasad *v.* Bhagwan Das 196

——*Foreclosure—Agreement between mortgagor and mortgagee—Breach by mortgagor—Right of mortgagee to fall back on mortgage rights.*] The mortgagee of certain shares of certain villages applied for foreclosure under Regulation XVII of 1806. While the year of grace was running and shortly before its expiration the mortgagor and the mortgagee came to a compromise in the matter of the mortgage. It was agreed by the mortgagor to transfer by sale to the mortgagee the shares of three of the villages, in lieu of the mortgage-money, and that he should not assert his rights under s. 7 of Act XVIII of 1873, as ex-proprietor, to retain the sir-lands appertaining to such shares. The mortgagee agreed to relinquish his claim on the remaining shares arising out of the mortgage and the foreclosure proceedings. It was further agreed that, if the mortgagor asserted the right mentioned above, the mortgagee should be entitled to assert his right in respect of all the shares as a mortgagee who had foreclosed. The mortgagor subsequently, in breach of his agreement, asserted his right under s. 7 of Act XVIII, of 1873 to the sir-lands appertaining to the shares transferred to the mortgagee. Thereupon the mortgagee sued the mortgagor for possession of all the shares by virtue of the foreclosure proceedings. *Held*, following *Lall Dhur Rai* v. *Gunput Rai*, that, on the failure of the mortgagor to give effect to the compromise transaction, the mortgagee was entitled to fall back on his equities under his mortgage and the foreclosure proceedings taken thereunder.

Dhondha Rai *v.* Megho Rai 333

——*Redemption—Tacking.*] The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage-money. *Held* that although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in

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title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage-money.

Allu Khan *v.* Roshan Khan 86

MORTGAGE.——*Suit for redemption—Decree for possession—Neglect to apply for execution within time—Fresh suit for redemption*] The plaintiff in this suit claimed possession of certain property by redemption of a usufructuary mortgage of it which he had given the defendants The plaintiff had previously sued the defendants for possession of the property by redemption of the mortgage and had obtained a decree for possession of it, but had not applied for execution of such decree within the time allowed by law.

Held that the plaintiff, having obtained in the former suit a decree for possession of the property, and having by his own neglect lost his right to execution of such decree, could not be permitted to revert to the position which he held before the institution of that suit, and to bring a fresh suit for possession. *Sheikh Golam Hossein* v. *Alla Rukhee Beebee* followed.

Anrudh Singh *v.* Sheo Prasad 451

——— *Unstamped transfer of mortgagee's interest, effect of—Re-transfer of interest—Award, effect of on transfer—Unstamped instrument, admissibility of in evidence—Finding of fact based on conjecture—Fraud*].—On the 17th September, 1866, *G* gave *Z* an usufructuary mortgage of certain immoveable property to secure the repayment of Rs. 7,101, purporting to be advanced by *Z*. As a fact only Rs. 2,301 of that amount were actually advanced by *Z*, the balance, Rs. 4,800, being advanced by *R*. In 1868 *Z* sold the mortgagee's interest in the deed of mortgage to *R* for Rs. 2,301, the transfer being by endorsement and not being stamped In April, 1869, *G* transferred a portion of the mortgaged property to *A*. In September, 1869, *R* sued to have such transfer set aside, claiming in virtue of the deed of mortgage and the transfer endorsed thereon. On the 23rd September, 1871, the Court of first instance refused to receive the transfer by endorsement in evidence and to proceed with the suit, because such transfer was not stamped. On the 20th April, 1872, *Z* executed a stamped transfer of the mortgagee's interest in the deed of mortgage in favour of *R* *R*, treating the order of the 23rd September, 1871, as an interlocutory one, presented the instrument of the 20th April, 1872, to the Court, and prayed that it would proceed with the suit. The Court proceeded with the suit and gave *R* a decree. This decree was reversed by the Court of first appeal on the ground that that instrument did not cure the defect of the transfer by endorsement, and that the order of the 23rd September, 1871, was final. The decree of the Court of first appeal was affirmed by the High Court in June, 1873. Thereupon *R* made a criminal charge against *Z* of cheating, in respect of the transfer by endorsement. This charge was eventually dropped, and was followed by a reference to arbitration by *R* and *Z*. According to the agreement to refer, which was dated the 17th August, 1874, the dispute between the parties was whether *R* should return the deed of mortgage to *Z* and *Z* return the Rs. 2,301 to *R* or not. The arbitrators made an award, which was dated the 18th August, 1874, which directed, *inter alia*, that *R* should return the deed of mortgage to *Z* and *Z* return the Rs. 2,301 to *R*. The deed was returned to *Z*, but the money was not returned to *R*. In 1875 *Z* applied under Regulation XVII. of 1806 to foreclose the mortgage. In 1880, the mortgage having been foreclosed, *S*, as *Z's* representative, sued for proprietary possession of the mortgaged property The lower Courts held that all the acts of *R* and *Z* subsequent to the disposal of *R's* suit of 1869 were fraudulent and collusive, and done with a view to evade the Stamp Law, and the person actually interested in the deed of mortgage was *R* and not *S*, and on this ground, as well as on other grounds, dismissed *S's* suit.

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Per STRAIGHT, J.—That the transfer by endorsement of the deed of mortgage, notwithstanding such transfer was not stamped, transferred to *R* the mortgagee's interest in the deed; that such interest could not be re transferred to *Z* except by a formal instrument stamped according to law, inasmuch as any other mode of re-transfer would leave *Z* under the same disabilities as regards the Stamp Law as *R*, as any suit instituted by *Z* would, strictly speaking, be based, not on the deed of mortgage, but on the re-transfer; and that therefore, under these circumstances, and having regard to the fact that *Z* had not returned the Rs 2,301 to *R*, *S* actually, though not ostensibly, based his suit upon a re-transfer of the mortgagee's interest in the deed of mortgage, which was not stamped, and for which he had not given any consideration, and consequently his suit was not maintainable.

Also that the award could not alter the effect of the transfer by endorsement.

Per MAHMOOD, J.—That the lower Courts were not justified in their findings as to the fraudulent and collusive nature of the acts of *R* and *Z* after the disposal of *R's* suit of 1869, or in finding that the person actually interested in the deed of mortgage was *R*, and not *Z*, such findings being based upon pure conjectures.

That the unstamped transfer by endorsement was inadmissible to show that *Z* had transferred his interest in the deed of mortgage to *R*, whether *R* or the mortgagor wished to use it in order to show that fact, and consequently *Z* must be still regarded as the person interested in the deed and *S* was therefore entitled to maintain the suit.

Shankar Lal *v.* Sukhran 462

MORTGAGE.——*Usufructuary mortgage—Failure of claim to enforce lien—Compensation for breach of contract to give mortgagee possession.*] A usufructuary mortgagee, the mortgagor having broken his agreement to give him in possession of the mortgaged property, sued the mortgagor to recover the principal mortgage money and interest by enforcement of lien. The property was not hypothecated as security for the mortgage money. *Held* that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled to compensation: that although the plaintiff did not expressly claim such relief, yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that on estimating the compensation which should be awarded, the principal mortgage money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide.

Mahesh Singh *v.* Chauharja Singh 245

——*Joint Mortgage—Contribution.*] *T* and *D*, in May, 1867, jointly mortgaged their respective two biswas shares of a certain village. In August, 1877, the mortgagee sued to recover the mortgage-money, by the sale of the mortgaged property, and obtained a decree. Before this decree was executed *L* obtained a decree against *D* in execution of which his two biswas share was put up for sale on the 20th June, 1878, and was purchased by *A*. Subsequently the mortgagee applied for execution of his decree, and *D's* two biswas share was attached and advertised for sale in execution thereof. In order to save such share from sale *A*, on the 29th June, 1878, satisfied the mortgagee's decree. He then sued *P*, *D's* co-mortgagor, to recover half the amount he had so paid, by the sale of *P's* two biswas. *Held* that, inasmuch as, when *A* discharged the whole amount of the mortgage-debt, he not only became entitled to a contribution of half such amount from *P*, but having acquired the rights of the mortgagee was competent to assert a lien on *P's* two biswas share, *A* was entitled to a decree as claimed.

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Pancham Singh v. Ali Ahmad 58

MORTGAGE—*Usufructuary—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use*] An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and interest, asking for enforcement of lien The instrument of mortgage did not contain an hypothecation of the property. *Held* that although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that, as regards the money-claim, the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract, or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits.

Sheo Narain v. Jai Gobind 281

——*Lease of mortgaged property by mortgagee to mortgagor—Jurisdiction of Revenue Court—Remedies of mortgagee under mortgage.*] On the 16th March, 1874, *L* gave *M* a mortgage on certain land for Rs 24,000 for a term of ten years, by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of interest; that the mortgagee should grant a lease of the land to the mortgagor, the latter paying the former the profits of the land every harvest in lieu of interest; that, if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage, and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease and to enter on the land, and collect the rents thereof, and apply the same to payment of interest. On the 21st March, 1874, *M* gave *L* a lease of the land, under which Rs 1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879 *M*, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land, but was successfully resisted by *L's* widow.

On the 16th January, 1880, *M* sued *L's* widow for interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage to the date of suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits.

Held that the mortgage and lease transactions must be regarded as one and indivisible and the questions at issue between the parties be dealt with *qua* mortgagor and mortgagee; that, so regarding such transactions and dealing with such questions, *M* and *L* did not stand in the position of "landholder" and "tenant" and the proceedings of 1879 in the Revenue Courts were had without jurisdiction; also that, although looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should in the first place seek possession of the land, yet as *M* had never obtained possession, but on the contrary had been resisted when he sought to obtain it, his present claim for interest was maintainable.

The Court directed that so much of the interest as was due at *L's* death should be recoverable from such property of his as had come

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into his widow's hands; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally.

Bhaghelin v. Mathura Prasad 430
MORTGAGE. *See* Act III. of 1877, ss. 17, 49 3
——— ——— ——— ——— ——— ——— ss. 28, 49, 60 14
——— ——— Act X of 1877, s. 43 257
——— ——— ——— Pre-emption 291, 414
MUHAMMADAN LAW.—*Husband and wife—Shia—Sunni—Suit for recovery of wife—Dower.*] A woman of the Sunni sect of Muhammadans, marrying a man of the Shia sect, is entitled to the privileges secured to her married position by the law of her sect, and does not thereby become governed by the Shia law.

Held, therefore, where a husband sued to recover his wife, the one being a Shia, and the other a Sunni, that the wife's dower being "exigible" dower, and not having been paid, the suit was not maintainable under Sunni law.

Nasrat Husain v. Hamidan 205
——— ——— ——— *Succession—Debts Suit against one of the heirs of a deceased person for debt*] The heirs to a deceased Muhammadan divided his estate among themselves according to their shares under the Muhammadan law of inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. *Held* that, inasmuch as such heirs had not by sharing in the estate rendered themselves liable for the whole of such debt, Muhammadan law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken. *Hamir Singh v. Zakir* referred to

Pirthipal Singh v. Husaini Jan 361
———. *See* Act VI. of 1871, s. 24 343
MUKHTAR. *See* Act XVIII of 1879, ss. 10, 32 375
PARTIES TO SUIT. *See* Partnership 437
PARTITION. *See* Act XII. of 1881, ss. 14, 95 *l*) 515
———. *See* Hindu Law 427
PARTNERSHIP—*Winding-up—Account—Suit for dissolution—Transfer of suit—Act IX of* 1872 (*Contract Act*), *s* 265—*Act X of* 1877 (*Civil Procedure Code*), *ss.* 25, 215—*Parties to suit—Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 106, 120—*Power of partner to mortgage partnership land—Power of partner to borrow money*]. *T*, *B*, *R*, and *W*, the owners of a certain estate in equal shares, in 1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864 *H*, *E*, and *I* joined the firm. In 1870 *H* died; and in 1871 *T* purchased the shares of *E* and *I* and in 1873 of *R*. In 1875 *T* gave the Delhi and London Bank a mortgage on such estate as security for the repayment of money which he had borrowed from the Bank ostensibly for the purposes of the estate. The Bank obtained a decree against him personally for the money, in execution of which his rights and interests in the estate were put up for sale on the 20th June, 1877, and were purchased by the Bank, which obtained possession of the estate in August, 1877 In August 1879 *B* and *W's* executor sued *T* and the Bank, claiming a declaration that they were or had been partners with *T* in the estate; that if the partnership should be held to be subsisting, it might be dissolved, or that if it had ceased to exist, the date of its termination might be fixed; and that in either event a liquidator might be appointed to take an account, and after realizing assets and discharging liabilities, might be

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ordered to pay them each one-third of such balance as remained. The suit was instituted in the Court of a District Judge. He transferred it to the Court of a Subordinate Judge. The High Court subsequently transferred it to its own file.

Held that the suit was not one falling within the purview of s. 265 of the Contract Act; but assuming that it was such a suit, and the Subordinate Judge had no jurisdiction, the High Court was nevertheless competent to transfer it.

That the Bank as *T's* representative by purchase, had been properly joined as a defendant in the suit.

That the period of limitation applicable to the suit was that provided in No. 120, and not No. 106, Act XV. of 1877, but that in either case the suit was within time, as the partnership was dissolved, and consequently time began to run, not from the death of *H* or the purchase by *T* of the shares of *E* and *I* in 1871, or of *R* in 1873, but in August 1877, when the defendant Bank took possession of the partnership property.

That as the effect of the purchases by *T* in 1871 and 1873 was to relieve the estates of *H*, *E*, *I*, and *R*, of all past and future liabilities of the partnership, in respect of which *B* and *W* still continued as liable as *T*, and to which they would have to contribute to discharge such purchases should be regarded and treated as made on behalf of the partnership, and therefore at the time of the execution of the mortgage of the estate *B*, *W*, and *T* were interested in the estate to the extent of one third each

That, although *T* was not authorized, either actually or impliedly, by *B* and *W* to mortgage the estate, and the mortgage therefore was not binding on them, yet as they allowed him to conduct the business of the estate in such a manner as to make it appear that the control and management of it rested with him, and he was for all ordinary business purposes their representative, *B* and *W* were bound, in any accounting that might take place, to recoup the defendant Bank for such advances as were made to *T* for the necessary purposes of the estate, in the same proportion as they must discharge debts due to other creditors.

That *T* was entitled to be reimbursed such moneys of his own as he had expended within the legitimate scope and for the proper purposes of the partnership as originally contemplated by the parties

Directions to the liquidator appointed how to proceed

Harrison *v.* The Delhi and London Bank 437

——————*See* Act IX. of 1872, ss. 239, 240 74

PENALTY *See* Bond 8

PLEA TAKEN FOR THE FIRST TIME IN SECOND APPEAL. *See* Act X of 1877, s 13 69

PLEADER *See* Act XVIII of 1879, ss. 10, 32 375

PRECATORY WORDS *See* Will, construction of 500

PRE-EMPTION—*Conditional decree—Question as to whether purchase-money has been paid within time—Act X. of* 1877 (*Civil Procedure Code*), *ss.* 214, 244] The plaintiff in a suit to enforce a right of pre emption obtained a decree to the effect mentioned in s. 214 of the Civil Procedure Code On payment by him of the purchase-money into court, the defendants objected, in the execution department, to such payment on the ground that it had not been made within time The Court which made the decree disallowed the objection. The defendants appealed from the order disallowing the objection They had previously appealed from the decree. The appellate Court heard both appeals together, and holding that the purchase-money had not been paid into court within time, reversed the decree, and allowed the objection. The plaintiff preferred a second appeal to the High Court from the appellate Court's decree, which was admitted. He also preferred an appeal from the appellate order allowing the objec-

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tion, but this appeal was rejected as being beyond time, and such order became final.

Held that, inasmuch as the question whether the plaintiff had paid the purchase money into court within time was not one relating to the execution of the decree within the meaning of s. 244 of the Civil Procedure Code, but was one which should be decided in the suit itself, and therefore the proceedings in the execution department touching that question were ill-founded, such order was not a bar to the hearing of the second appeal preferred by the plaintiff.

Muhammad Ali *v.* Debi Din Rai 420

PRE-EMPTION—*Co-sharer joining relatives with him in claiming right—Effect on co-sharer's right—Stranger.*] A co-sharer of an estate, who has a right of pre-emption, does not, merely by joining with himself members of his family, who are not co-sharers in such estate, in a suit to enforce such right, defeat such right. *Manna Singh* v. *Ramadhin Singh* distinguished.

Bhurey Mal *v* Nawal Singh 259

———*Joint purchase—Suit against one of the purchasers—Addition of other purchaser as defendant—Effect of suit as regards the latter being barred by limitation—Act XV. of* 1877 (*Limitation Act*), *s.* 22.] *P*, on the 12th April, 1880, instituted a suit against *Z* claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother *A* jointly, under an instrument dated the 12th April, 1879. On the 3rd May, 1880, *A* was made a defendant to such suit, *Z* being appointed guardian for the suit for him.

Held that, inasmuch as such suit, as regards *A*, was beyond time, and as the only relief which could be granted therein to *P* was the invalidation of the joint sale to *Z* and *A*, such suit, even admitting it was within time as regards *Z*, was not maintainable.

Habib-ul-lah *v.* Achaibar Pandey 145

———*Joint purchase by co-sharer and strangers—Specification of interests taken by purchasers.*] A co-sharer of an estate sold his share to *R*, who was also a co-sharer in such estate, and to two other persons, who were not co-sharers, but "strangers," selling it to all of them jointly and collectively, for one integral sum as the consideration for the whole. The deed of sale specified that each of the purchasers took a one-third share of the property sold. The co-sharers of the estate were entitled, on the sale by a co-sharer of his share, to the right of pre-emption. *Held* that such specification could not alter the joint nature of the sale transaction or permit of its being broken up and treated as involving three separate contracts, so as to entitle *R*, as a co-sharer having an equal right of pre-emption, to resist, so far as one-third of the property was concerned, a claim by another co-sharer to enforce a right of pre-emption in respect of such sale, but *R* must be regarded as "stranger" in respect of the whole of the property sold by reason of having associated himself with "strangers." *Ganeshee Lal* v. *Zaraut Ali* observed on

Manna Singh *v* Ramadhin Singh 258

———*Joint sale of undivided mahal and other property—Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 10.] In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided mahal, which does not admit of physical possession, limitation will run from the date of registration of the instrument of sale

Bholi *v* Imam Ali 172

——— *Mortgage—Conditional sale—Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 10—*Time from which period begins to run.*] A conditional vendee, who was in possession, applied under Regulation XVII of 1806 to have the conditional sale made absolute The year of grace expired in July, 1878. In November, 1871, the conditional vendee sued for possession of the property by virtue of the condition-

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al sale having become absolute. He obtained a decree, in execution of which he obtained, on the 30th April, 1879, formal possession of the property according to law. On the 23rd March, 1880 a suit was brought against him to enforce a right of pre-emption in respect of the property. *Held* that the period of limitation for such suit ran, not from the expiration of the year of grace, but from the 30th April, 1879, the date the conditional vendee obtained possession in execution of his decree.

Prag Chaubey *v.* Bhajan Chaudhri 291

PRE-EMPTION.—*Mortgage by conditional sale—Limitation—Right to sue—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No* 120.] The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by No. 120, sch. ii of Act XV of 1877, that is to say, six years (*Nath Prasad* v. *Ram Paltan Ram* followed); and where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure has to sue for possession, the right to sue to enforce a right of pre-emption accrues when he obtains a decree for possession.

Rasik Lal *v.* Gajraj Singh 414

——— ——— ———*Share of undivided mahal—Conditional sale—Limitation—Act XV of* 1877 (*Limitation Act*), *sch.* ii., *Nos.* 10, 120.] The limitation applicable to a suit to enforce a right of pre-emption in respect of a conditional sale of a share of an undivided mahal is that contained in art. 120, sch. ii. of Act XV. of 1877, *viz.*, six years.

Nath Prasad *v.* Ram Paltan Ram 218

———————*Share of undivided mahal—Limitation—Act XV of* 1877 (*Limitation Act*), *sch.* ii, *No.* 10—*Physical possession.*] A share in an undivided zamindari mahal is not susceptible of "physical possession" in the sense of No. 10, sch. ii. of Act XV. of 1877. Limitation, therefore, in a suit to enforce a right of pre-emption in respect of such a share runs from the date of the registration of the instrument of sale.

Unkar Das *v.* Narain 24

——— ——— ——— *See* Act X. of 1877, ss. 45, 578 163

——— ——— ———. Act XV. of 1877, s. 4 37

PROMISSORY NOTE. *See* Act I. of 1872, s. 91 135

PURCHASER WITHOUT NOTICE. *See* Hindu Law 296

PURCHASE-MONEY. *See* Contract of sale 168

REGISTERED AND UNREGISTERED DOCUMENTS. *See.* Act III. of 1877, s. 50 227

——— ——— BOND. *See* Act XV. of 1877, sch. ii No. 116 255

REGISTRATION. *See* Act XX. of 1866. Act VIII. of 1871. Act III. of 1877

REGULATION XVII. of 1806 s. 7.—*Notice of foreclosure not signed by Judge—Invalidity of foreclosure proceedings.*] A notice issued under Regulation XVII. of 1806, which does not bear the signature of the District Judge, but bears the seal of his Court only, is informal and bad, and the foreclosure proceedings in which such a notice has issued are invalid *ab initio.*

Basdeo Singh *v.* Mata Din Singh 276

RELATION RESEMBLING CONTRACT. *See* Small Cause Court suit, 132

RELIGIOUS ENDOWMENT.—*Right to officiate in temple—Alienation—Execution of decree.*] The right of managing a temple which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, cannot, in default of proof to the contrary, pass outside the family of the trustee, until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree. The principle laid down by the Privy Council in *Rajah Vurmah Vali* v. *Ravi Vurmah Valia Muttia* followed.

RE-MARRIAGE OF HINDU WIDOW. *See* Act XV. of 1856, s. 3 ... 195

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RES JUDICATA.—*Same parties*] *M*, in 1866, brought a suit against *A*, her son *S*, *B* and *C*, who like her all claimed a right to inherit the estate of *K*, deceased, for her share by inheritance in *K's* estate, alleging that she had been lawfully married to him. She only denied *A's* right to inherit, who claimed as *K's* adopted son; admitting the right of *S*, who claimed as her lawful son by *K*, and that of *B* and *C*, who claimed as wife and daughter respectively of *K*. *S* supported his mother's claim. *A*, *B*, and *C* denied that *M* had been lawfully married to *K*, and alleged that *S* was the son of *M*, not by *K*, but by another person. It was decided in that suit that *M* had been lawfully married to *K*; that *S* was the lawful son of *K* by *M*; and that *A* was not the adopted son of *K*. In 1880 *S* sued *A* for possession of *C's* share in such estate, *C* having died, claiming as *C's* step-brother and heir. *A* set up as a defence that *M* was not *K's* wife nor was *S* *K's* son. *Held* that, inasmuch as, although in the former suit *A* and *S* stood together in the same array, they were in fact opposed to each other, *S* being on the side and supporting the case of his mother, and *A* being the true defendant, such suit was one between the same parties as the second, and the matter of *S's* legitimacy having been raised and finally decided in the former suit by a competent Court, was *res judicata* and could not be again raised in the second suit.

Shaaal Khan *v.* Amin-ulla Khan 92

——— *Determination o title by Revenue Court—Jurisdiction of Civil Court—Act XVIII of* 1873 (*North-Western Provinces Rent Act*) *ss.* 36—39.] The defendants, claiming to be occupancy-tenants of certain land and alleging that the plaintiff was their sub-tenant, caused a notice of ejectment to be served on the plaintiff under ss. 36—39 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application contesting his liability to be ejected, alleging that he had a right of occupancy in such land jointly with the defendants and was not their sub-tenant. The Assistant Collector trying the case finally decided that the plaintiff was the sub-tenant of the defendants, and the plaintiff was ejected. The plaintiff then sued the defendants in the Civil Court for a declaration of his right as an occupancy tenant to such land and possession of the same. *Held* that the decision of the Assistant Collector as to the respective rights of the parties could only be regarded as incidental and ancillary to the main point to be determined by him, *viz.*, whether, assuming the relation of landlord and tenant to exist between the parties, the plaintiff was liable to be ejected, and such decision was not a bar to a fresh determination of such rights in the Civil Court.

Birbal *v.* Tika Ram 11

——— *See* Act X. of 1877, s. 13 ... ... 21, 55, 65, 69, 97

REVERSIONER. *See* Hindu Law 16, 532

REVIEW OF JUDGMENT. *See* Act X. of 1877, ss. 623, 624 ... 278

RIGHT TO SUE. *See* Pre-emption 414

"SAME PARTIES." *See* Res judicata 92

SECURITY FOR KEEPING THE PEACE. *See* Act X. of 1872, s. 489 212

SEPARATE TRIAL. *See* Act XLV. of 1860, ss. 193, 196 293

SHIA. *See* Muhammadan Law 205

SINGLE BOND. *See* Act III. of 1877, ss. 17, 49 3

STRANGER. *See* Pre-emption 259

SMALL CAUSE COURT SUIT.—*Suit for money had and received for the plaintiff's use*] *C*, a mortgagee, the mortgage having been foreclosed, sued *D*, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with *D* to surrender the mortgaged property to him, if he deposited the mortgage-money in Court by a specified day. *D* borrowed the money for this purpose by means of a conditional sale of the property to *L*, and deposited it in Court. The deposit was made after the specified day and consequently *C* took possession of the property.

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The money deposited by *D* remained in deposit, and while there *C* caused it to be attached in execution of a money-decree he held against *D*, and it was paid to him. *L* thereupon sued *C* in the Munsif's Court to recover such money, which amounted to Rs. 350 *Held* that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes

Lachman Prasad *v.* Chhammi Lal ... .

SMALL CAUSE COURT SUIT.—*Suit for money had and received for plaintiff's use—Implied contract—Zamindari due.*] A zamindar as such claimed and realized from a tenant Rs. 20, being one fourth of the price of trees cut down and sold by the tenant, basing his claim on general usage The tenant sued to recover such money, denying that any such usage existed *Held* that the suit was in the nature of one for money had and received by the defendant for the plaintiff's use, and therefore cognizable in the Court of Small Causes. *Lachman Prasad* v. *Chammi Lal* (1) followed.

The Collector of Cawnpore *v.* Kedari 19

——— *Payment of revenue by a person for another—Suit for reimbursement*] A suit by the proprietor of one village who has been compelled to pay the revenue payable by the proprietor of another village for reimbursement is, where the amount of such payment does not exceed Rs 500, a suit of the nature cognizable in a Mufassal Court of Small Causes. *Nath Prasad* v. *Bay Nath* followed.

Qutub Husain *v.* Abul Hasan 134

——— *Relations resembling contract—Act IX of 1872 (Contract Act), ss. 69, 70—Payment of land-revenue – Act XI of 1865, s 6*] The plaintiffs purchased land belonging to the defendant at an execution-sale, at which it was notified that arrears of revenue were due in respect of the land. The plaintiffs paid such arrears, and also the arrears which had accrued in the period between the sale and the date the plaintiffs obtained possession. They then sued the defendant in the Munsif's Court to recover the amount they had paid. *Held* that, with reference to the principle laid down in *Nath Prasad* v *Bay Nath*, the suit should have been instituted in the Court of Small Causes.

In the Matter of the Petition of Ali Mazhar 152

——— *Claim for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1865, s 6*] A suit to recover moveable property attached in execution of a decree and damages for its wrongful attachment, and to set aside the order disallowing an objection to its attachment, is not a suit cognizable in a Court of Small Causes

Muk and Lal *v* Nasir-ud-din 416

SUIT AGAINST MINOR. *See* Act XL of 1858, s 3 177

——— *See* Act XV. of 1877, s. 4 37

——— AGAINST MUNICIPAL COMMITTEE. *See* Act XV. of 1877, sch ii, No 120 ... . 102, 339

——— BY SOME OF SEVERAL CO-SHARERS. *See* Act X. of 1877, s 578 289

——— BY SON TO SET ASIDE FATHER'S ALIENATION OF ANCESTRAL PROPERTY. *See* Hindu Law 235

——— FOR DISSOLUTION OF MARRIAGE *See* Act IV of 1869, ss. 51, 52 49

——— FOR DISSOLUTION OF PARTNERSHIP. *See* Partnership .. 437

——— FOR MONEY HAD AND RECEIVED FOR THE PLAINTIFF'S USE *See* Small Cause Court suit 6, 19

——— FOR LAND AND DEMOLISHMENT OF BUILDINGS ERECTED THEREON *See* Jurisdiction 320

——— FOR RECOVERY OF WIFE. *See* Muhammadan Law... ... 205

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SUIT FOR DECLARATORY DECREE. *See* Act XV. of 1877, sch. ii., No. 120 ... ...102, 330
——— FOR PERSONAL PROPERTY *See* Small Cause Court suit ... 416
——— FOR REIMBURSEMENT. *See* Small Cause Court suit ... 134
——— ON ACCOUNTS STATED. *See* Contract 339

SUIT ON BEHALF OF MINOR—*Permission to sue.*] The uncle of a minor instituted a suit on his behalf without obtaining the formal permission of the Court in which such suit was instituted to sue on his behalf. The uncle's right to sue was denied by the defendant; and the first of the issues framed was whether he had such right. The Court decided that he had such right. *Held*, in second appeal, that, although permission to sue or defend a suit on behalf of a minor should be formally granted, to be of effect, such decision might fairly be accepted as in this case a sufficient and effective permission to the uncle to sue, and he was competent to maintain such suit. *Mrinamoyi Dabia* v. *Jogodishari Dabia* referred to.

Pirthi Singh v. Lobhan Singh 1
——— ——— *See* Act XL. of 1858, s 3 165
——— WHEN INSTITUTED. *See* Act XV of 1877, s. 4 37
SUNNI. *See* Muhammadan Law 205
TACKING. *See* Mortgage 85
TRANSFER OF SUIT. *See* Act X. of 1877, ss. 25, 57, 588 (6) ... 478
——— ——— Partnership 437
TRUSTEE. *See* Act XV. of 1877, s. 10 187
UNREGISTERED BOND. *See* Act III. of 1877, ss. 17-49 3
——— CONVEYANCE. *See* Act III. of 1877, ss. 58-60, and 87 206
——— INDIGO SATTA. *See* Act III. of 1877, s 49 ... 232
UNSTAMPED INSTRUMENT, ADMISSIBILITY OF, IN EVIDENCE. *See* Mortgage 462
——— TRANSFER OF MORTGAGEE'S INTEREST, EFFECT OF. *See* Mortgage 462
USING EVIDENCE KNOWN TO BE FALSE. *See* Act XLV. of 1860, ss. 193, 196 293
USUFRUCTUARY MORTGAGE. *See* Mortgage 245
VALUATION OF SUIT. *See* Jurisdiction 320

VENDOR AND PURCHASER.—*Covenant for good title to convey—Construction of covenant.*] An instrument of sale contained the following condition:—"Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and the costs of litigation." The purchaser having lost the property, by reason of a person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the costs incurred by him in defending such suit, basing his claim upon the condition set forth above. *Held* that the suit was not maintainable, as such condition referred to flaws or defects in the vendor's title, and was not applicable to a loss accruing to the purchaser from his disqualification to buy.

Ghulam Jilani v. Imdad Husain 357
——— ——— *See* Contract of sale 168
VOID AGREEMENT. *See* Act IX. of 1872, ss. 13, 20 334

WILL, CONSTRUCTION OF—*Precatory words—Mis-statement in petition for special leave to appeal—Costs.*] In order to create a precatory trust the words must be such that the Court finds them to be imperative on the first taker of the property; and the subject of the gift over must be well defined and certain.

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A testator made a gift in these words: "I give to my dearly beloved wife the whole of my property both real and personal (described) feeling confident that she will act justly to our children in dividing the same when no longer required by her" *Held*, that the widow took an absolute interest in the property, and that no trust for the benefit of the children was created.

An order in Council granting leave to appeal is liable at any time to be rescinded with costs, on its appearing that the petition upon which the order has been granted contains any mis-statement, or any concealment of facts which ought to have been disclosed. Even if there has been no intention to mislead, a material misstatement having been made, the order is still liable to be rescinded; and, to maintain it, to clear the case of bad faith is not sufficient. *Mohan Lall Sahul* v *Bebee Dass* referred to and followed.

Of three grounds on which special leave to appeal had been obtained, two had been correctly stated, but with the third was connected error in the petition, to which objection was taken at the hearing. On its appearing that there had been no intention to mislead, the appeal was heard and allowed; but, in regard to the above, without costs. *Ram Sahuk Bose* v. *Monmohini Dossee* (2) referred to.

The Mussoorie Bank, Limited, *v.* Albert Charles Raynor ... 500

WINDING UP. *See* Partnership 437

WITNESS FOR THE DEFENCE. *See* Act X. of 1872, s. 359 ... 53

WITHDRAWAL OF PROSECUTION. *See* Act X. of 1872, ss. 196, 197, Explanation 150

WRITTEN ACKNOWLEDGMENT OF DEBT. *See* Act I. of 1872, s. 91 135

ZAMINDARI DUE. *See* Small Cause Court Suit 19